SUPREME COURT, U.S.
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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-311

DAVID B. SWOAP, as Director, etc., et al.,
Petitioners,

vs.

LAURA COOPER,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
The Decision Below Erroneously Brings California Welfare Law Into Conflict With the Objectives of Congress	5
Conclusion	9
Appendices	

TABLE OF AUTHORITIES CITED

Cases	Pages
Cooper v. Swoap, 11 Cal.3d 856, 524 P.2d 97 (1974)	1
Hamilton v. Regents, 293 U.S. 245 (1934)	2
King v. Smith, 392 U.S. 309 (1968)	5
Lewis v. Martin, 397 U.S. 552 (1970)	5
Northern Pacific v. Dept. of Public Works, 268 U.S. 39 (1924)	2
Rosado v. Wyman, 397 U.S. 397 (1970)	6
Shea v. Vialpando, ... U.S. ..... (1974)	6
Townsend v. Swank, 404 U.S. 282 (1971)	6

Codes

United States Code:	
28 U.S.C. 1257(3)	2
42 U.S.C. 402(a)(24)	3
42 U.S.C. 602(a)(7)	2, 5, 6, 7
42 U.S.C. 1381	3
42 U.S.C. 1382(a)(2)(A)	7, 8
Welfare and Institutions Code:	
§ 11006	5
§ 11450	3, 4, 5
§§ 12000-12400	3

Statutes

California Statutes:	
Stats. 1971, ch. 578	3
Stats. 1972, ch. 1371	3
Stats. 1972, ch. 1406	3
Stats. 1973, ch. 1216	3
Stats. 1974, ch. 75	3

MISCELLANEOUS

	Pages
California Federal Register:	
45 C.F.R. 233.20(a)(3)(ii)(a)	6
45 C.F.R. 233.20(a)(3)(ii)(c)	5
45 C.F.R. 233.20(a)(ii)(a)	6
Public Social Services Regulations:	
§ 44-115.8	3
§ 44-115.9	4, 5
Social Security Act of 1935	2
Social Security Act, Title XVI	3

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Comes now petitioner State of California, Department of Benefit Payments, and respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered July 2, 1974.

OPINION BELOW

The judgment and opinion of the Supreme Court of the State of California appears as Appendix A hereto and is reported at 11 Cal.3d 856, 524 P.2d 97 (1974).

JURISDICTION

The judgment and opinion of the Supreme Court of the State of California was entered on July 2, 1974. Rehearing was denied August 7, 1974. This petition was filed within ninety days of July 2, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). Review is sought of a state court decision which invalidated a state departmental administrative regulation which applied to all AFDC recipient children. As an exercise of the state's law-making power, the regulation in question comes within the meaning of "state statute" as used by Congress in 28 U.S.C. 1257(3). See *Hamilton v. Regents*, 293 U.S. 245, 258 (1934); *Northern Pacific v. Dept. of Public Works*, 268 U.S. 39, 42 (1924).

QUESTION PRESENTED

Congress in enacting the AFDC provisions of the Social Security Act of 1935, as amended, requires that the amount of assistance paid by a state be based on the amount needed in the individual case after other income and resources are considered. 42 U.S.C. 602(a)(7). California promulgated welfare regulations which reduced AFDC grants by the value of housing and utility needs shared with an adult aid recipient. The question presented is whether the decision of the Supreme Court of the State of California invalidating the regulation as conflicting with state law brings state law into conflict with federal law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> "Section 602(a) A state plan for aid and services to needy families with children must . . . (7) . . . provide that the state agency shall, in determining need, take into consideration any other income and *resources* of any child or relative claiming aid to families with dependent children, ..." (Emphasis added.)

STATEMENT OF THE CASE

Respondent Laura Cooper is an ATD[1] welfare recipient, and in addition receives AFDC aid on behalf of her five minor children. CT 2, 111. Respondent Moice Palladino receives ATD welfare benefits for herself and AFDC benefits on behalf of her minor son. CT 2, 111. Respondent CWRO is an association which has welfare recipients among its membership and which initiates litigation on their behalf. CT 2, 3, 111. Under the maximum aid schedules established by Section 11450,[2] the Cooper children, considered as an AFDC budget unit, were entitled to receive a maximum aid of $320.00, *i.e.*, the AFDC grant plus nonexempt income could not exceed $320.00. Appendix A, p. 5. Under Regulation PSS 44-115.8, there was counted against the maximum aid $31.00 as in-kind nonexempt income. Appendix A, p. 5. Regulation 44-115.8 provides that when an AFDC eligible child resides with an adult aid recipient, and if the AFDC child's housing and utilities allowance exceeds his share of the actual cost of housing

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1. Effective January 1, 1974, the California adult aid programs (ATD, AB, OAS) were "federalized" under a new Social Security Act, Title XVI. 42 U.S.C. 1381 et seq. California has elected to supplement the federal Title XVI program with a federally administered adult aid supplementary program. §§ 12000-12400; Stats. 1973, ch. 1216; Stats. 1974, ch. 75. Title XVI provides:

> "If an [Title XVI] individual is receiving benefits under . . . [Title XVI], then, for the period for which such benefits are received, such [Title XVI] individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the [AFDC] family under . . . [Title IV] and his income and resources shall not be counted as income and resources of a [AFDC] family under . . . [Title IV]." 42 U.S.C. 402(a)(24).

2. Unless otherwise indicated, all section references are to the California Welfare and Institutions Code. Section 11450 as amended Calif. Stats. 1971, ch. 578, and by Calif. Stats. 1972, ch. 1371; repealed Calif. Stats. 1972, ch. 1406; added Calif. Stats. 1972, ch. 1406; Appendix B hereto.

and utilities (including telephone), then the excess shall be countable against the child's maximum aid payment as income. CT 64-65; Appendix C hereto. Respondent Laura Cooper pays $84.00 per month for housing and utilities. The childrens' pro rata share is $70.00 (five-sixths of $84.00). The value of the housing and utility needs of the five children is established at $101.00. CT 65; Regulation PSS 44-115.9; Appendix C hereto. Since the children's pro-rata expenditure for housing and utilities ($70.00) is less than the value of housing and utility needs provided in a maximum aid payment ($101.00), the AFDC grant to the children was reduced by $31.00. This amount represents the value of the in-kind income to the children resulting from their sharing of housing and utility needs with an adult aid recipient.

Petitioner Palladino pays $88.00 per month for housing and utilities. Appendix A, p. 6. The pro rata share of the Palladino child is one-half or $44.00. The value of the housing and utility needs of one child is $67.00. CT 65; Regulation PSS 44-115.9; Appendix C hereto. $67.00 less $44.00 equals $23.00 in countable in-kind income which was deducted from the $115.00 maximum aid payment to the child.

The Supreme Court of the State of California held that the regulation was invalid under state law because the Legislature had considered and rejected adoption of the constructive receipt of income concept. Appendix A, pp. 12-15. The court below further held the regulation invalid as being inconsistent with Section 11450 which utilized a "flat grant" schedule, *i.e.*, the amount of the grant increased with an increase in the number of persons in the AFDC budget unit, as contrasted to the system in effect prior to October 1971 where individual needs were individually computed. Appendix A, pp. 7-8; 15-19. Specifically, the court below held that such non-cash benefits as utilities and housing do

not constitute "income" under Section 11450 which must be deducted from the flat grant maximum aid payment. Appendix A, pp. 19-24.

As a further ground of invalidity the state court found that the regulation in question had the effect of treating the welfare benefit paid to an adult as income to the AFDC child in violation of Section 11006.[3] Finally, the court below held the challenged regulation invalid under federal law as assigning a fictional value to the utility and housing benefits received by the AFDC child. Appendix A, pp. 26-28. Instead of calculating the actual values, the regulation instead calculates the said values by subtracting the AFDC child's pro rata expenditure from the fixed utility and housing averaged "allowance" established by the state. Regulation PSS 44-115.9; CT 64-65, Appendix C; Appendix A, pp. 26-29. The regulation therefore failed to comply with 42 U.S.C. 602(a)(7) and 45 C.F.R. 233.20(a)(3)(ii)(c) which require that only a recipient's actual available income be considered in determining the amount of the maintenance grant. *Lewis v. Martin,* 397 U.S. 552 (1970); *King v. Smith,* 392 U.S. 309 (1968). Appendix A, pp. 26-29.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW ERRONEOUSLY BRINGS CALIFORNIA WELFARE LAW INTO CONFLICT WITH THE OBJECTIVES OF CONGRESS

The AFDC program is based on a scheme of cooperative federalism. *King v. Smith,* 392 U.S. 309, 316 (1968). State participation in the program is not required at the cost of losing federal funds. As long as a state is receiving federal

3. Section 11006. "All money paid to a recipient . . . as aid is intended to help the recipient meet his individual needs . . . and is not for the benefit of any other person. Aid granted shall not be construed as income to any person other than the recipient. . . ."

funds, however, it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds. *Rosado v. Wyman,* 397 U.S. 397, 408 (1970); *Townsend v. Swank,* 404 U.S. 282, 286 (1971).

In administering AFDC programs, state agencies are required, in determining need, to ". . . take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, ..." 42 U.S.C. 602(a)(7).[4] Under HEW regulations, all AFDC plans must specify a statewide standard of need. Both eligibility for AFDC assistance, and the amount of the aid to be paid, are based on a comparison of the "standard of need" with the income and resources available to the applicant or recipient. 45 C.F.R. 233.20(a)(ii)(a).[5] This Court, after noting the language of 42 U.S.C. 602(a)(7) and of the applicable federal regulation, stated:

> "From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered. (Emphasis in original text; footnote omitted.) Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account, and this individualized approach has been reflected in the implementing regulations." *Shea v. Vialpando,* ..... U.S. ....., ... (1974).

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4. A state AFDC plan must "provide that the state agency shall, in determining need, take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, ..." 42 U.S.C. 602(a)(7). (Emphasis added.)

5. "A state plan for . . . AFDC . . . must . . . [p]rovide that, in establishing financial eligibility and the amount of assistance payment . . . [a]ll income and *resources* . . . will be considered in relation to the state's standard of assistance. . . ." 45 C.F.R. 233.20(a)(3)(ii)(a). (Emphasis added.)

Neither the federal statute nor regulations define "resources" as used in 42 U.S.C. 602(a)(7). Yet in the related Supplemental Security Income (SSI) program, Congress recognized that the provision of housing, support, and maintenance by a non-aid recipient to an SSI recipient constitutes a resource having value which acts to reduce the SSI aid otherwise payable. Thus 42 U.S.C. 1382(a)(2)(A) provides:

> ". . . that in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in-kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) . . . shall be reduced by 33⅓ percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph; . . . ."

It is petitioners' position that the value of "support and maintenance" recognized as income by Congress in 42 U.S.C. 1382 (a)(2)(A) is the same as the value of "housing and utilities" which the state regulation sought to recognize. If this analogy is proper, then the state is required by 42 U.S.C. 602(a)(7) to recognize as non-exempt income the value of the "housing and utilities" provided by an adult aid recipient to the AFDC eligible child.

One objective of the regulation was to equalize welfare benefits between AFDC eligible children. Using the five children in the Cooper family as an example, it is obvious that as a consequence of the invalidity of the regulation these children will receive an extra cash benefit each month because a portion of their housing and utilities are provided free to them through Laura Cooper's ATD maintenance grant. An identical five children AFDC budget unit who

do not live with an adult aid recipient will have to pay for utilities and housing out of their AFDC grant. This invidious discrimination would be measured by the difference between the reduced cost for utilities and housing to the Cooper children AFDC budget unit, and the cost of utilities and housing actually paid by the second budget unit.

In explaining its decision, the California Supreme Court attempted to distinguish between two different kinds of indirect economic benefits. The Court felt that the value of commodities, housing cash given an AFDC child would be countable against his maintenance grant whereas the AFDC child who saves on housing costs by sharing a household with others does not receive countable income. Appendix A, pp. 28, fn. 19. However, as discussed above, Congress in 42 U.S.C. 1382(a)(2)(A) did recognize that the provision of housing, support and maintenance to a SSI welfare recipient did produce countable income which required a one-third reduction in the SSI maintenance grant.

It follows that the decision below erroneously construed state welfare law so as to cause it to come into conflict with

the paramount federal requirements that, in determining the needs of an AFDC child, a state shall take into consideration the child's income and resources.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California in this cause.

Respectfully submitted,

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Appendix A

Copy

In the Supreme Court of the State of California

IN BANK

Sac. 7985

Super Ct. No. 219145

Laura Cooper et al.,

Plaintiffs and Appellants,

vs.

David B. Swoap, as Director, etc.,

Defendant and Respondent.

In this case, as in the companion case of *Waits v. Swoap, post,* p. ....., we must determine the validity, under state and federal law, of an administrative welfare regulation promulgated by the State Department of Social Welfare subsequent to the enactment of the Welfare Reform Act of 1971. The regulations at issue in both cases represent variations on a single administrative theme: that "noncash economic benefits" enjoyed by certain recipients of aid to families with dependent children (AFDC) may be treated as "income" of such recipients so as to warrant a reduction of their welfare grants.[1] The regulation challenged in the instant case finds that such "noncash economic benefits" may arise when AFDC recipients share housing with a recipient of one of the state's "adult aid" programs; ac-

SEE DISSENTING OPINIONS

1. In California Welfare Rights Organization v. Brian (1974) ..... Cal.3d. ....., we recently examined a similar welfare regulation which reduced AFDC grants to expectant mothers on the rationale that the value of a pregnant woman's body represented deductible "income" to her fetus. In *Brian* we found the regulation invalid, concluding that the governing statutes could not reasonably be interpreted to authorize such deduction.

cordingly, in such situations the regulation requires that the AFDC grant be reduced by a designated sum. The principal question presented is whether this particular regulation, and, more generally, the entire "noncash economic benefit" concept, is consistent with the governing statutory scheme.

For the reasons discussed more fully below, we have concluded that the regulation at issue here cannot be squared with the controlling provisions of the Welfare Reform Act of 1971, and is therefore invalid. Initially, we shall point out that at the time the 1971 legislation was enacted a provision identical to the instant regulation was proposed by the administration but was decisively rejected by the Legislature; thus, the legislative history provides perhaps the clearest indication that the present regulation is inconsistent with legislative intent.

Moreover, we shall explain that on a more general level the department's newly devised "noncash economic benefit" concept is completely at odds with the "flat grant" system of welfare benefits that lies at the heart of the 1971 welfare reform legislation. In establishing a flat grant system, the Legislature consciously abandoned the previous practice under which welfare grants were set on the basis of an administrative determination of need; instead, the Legislature took it upon itself to set fixed grant levels to be paid to *all* recipients without regard to individual need. The regulation at issue directly contradicts this flat grant approach, reducing certain recipients' grants on the basis of an administrative judgment that such recipients have less need than other recipients.

Although the department defends its new approach on the ground that "noncash economic benefits" generally, and shared housing in particular, constitute "income" to re-

cipients which may properly be considered in calculating welfare grants, such benefits have never been considered income throughout the entire history of California's welfare system, and we can find absolutely no indication that the Legislature intended to alter its consistent treatment of such "benefits." Moreover, with respect to the "adult aid" payments governed by the instant regulation, a specific statute explicitly mandates that such aid "shall not be construed as income" under these circumstances (Welf. & Inst. Code, § 11006). Finally, we shall explain that even if it were permissible to construe "noncash economic benefits" as income, the present regulation would be invalid for it does not measure the actual value of benefits received by an individual recipient but instead assigns an arbitary, fictitious measure of income, in contravention of the controlling federal and state statutes.

Consequently, we have concluded that the challenged regulation cannot stand.

1. *The facts.*

Laura Cooper is a recipient of aid to the disabled (ATD); she lives with her five minor children and receives on their behalf aid to families with dependent children (AFDC). Moice Palladino has also been receiving ATD benefits for herself and AFDC benefits on behalf of her minor son. The ATD program covers only the mother's needs; the AFDC program covers the needs of the children.

Under the payment schedule established by the Legislature in Welfare and Institutions Code section 11450, the Palladino child was entitled at the time this litigation was instituted to a welfare grant of $115 per month (AFDC unit of one), and the Cooper children to a grant of $320 per month (AFDC unit of five). Because both of the fam-

ilies qualified for two welfare programs, however, the State Department of Social Welfare (department) directed that the grants to the children be reduced by application of its newly propounded Regulation 44-115.8,[2] the regulation at issue in the instant case. Under this new regulation, the Palladino child was to receive $92 per month instead of $115 (a $23 deduction) while the Cooper children would obtain $289 per month instead of $320 (a $31 deduction).[3]

Mrs. Cooper and Mrs. Palladino, joined by the Californa Welfare Rights Organization, then instituted the present class action against the department challenging the validity of Regulation 44-115.8. All parties stipulated that no factual disputes existed and after oral argument the superior court granted the department's motion for

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2. Regulation 44-115.8 provides that when one or more recipients of AFDC aid reside in the same household with one or more recipients of adult aid, "if the recipient's housing and utilities allowance exceeds his share of the actual cost of housing and utilities (including telephone) the excess shall be considered in-kind income and taken into consideration in computing the grant. [¶] Each recipient's share shall be calculated by dividing the total actual cost of housing and utilities (including telephone) by the number of persons (adults and minors, needy and non-needy) residing in the household."

3. The deductions are calculated in the following manner. The Palladinos pay $88 per month on housing and utilities. The son's pro rata share is $44 (one-half of $88). The pro rata share ($44) is then deducted from the administrative "allowance" for housing and utilities for one AFDC child ($67); $67 less $44 yields $23 which is the purported value of the in-kind income to the child from shared housing. The Coopers pay $84 per month on housing and utilities. The children's pro rata share is $70 (five-sixths of $84). The administrative allowance for housing and utilities for four or more AFDC children is $101; $101 less $70 yields $31 in-kind income purportedly received by the Cooper children.

The figures throughout this opinion refer to the figures in force at the time this action was initiated. Although the figures have since been adjusted in response to cost of living increases, such changes do not affect the substantive analysis of the regulation's validity.

summary judgment, concluding that the challenged regulation was valid under state and federal law. Plaintiffs appeal from that judgment.

2. *The governing statutory background.*

In determining whether or not the regulation before us is consistent with the current California statutory scheme, we must briefly review the historical background of the Welfare Reform Act of 1971. Prior to 1971, the Legislature had delegated to the department the authority to determine individual recipients' needs, and to pay corresponding benefits, up to a statutory maximum. The department accordingly promulgated detailed regulations specifying allowances for itemized needs. Allowances for nonhousing items, such as food and clothing, were calculated on the basis of the age and sex of each family member, the family's size and county of residence; the housing and utilities allowances reflected actual payments for these commodities up to a specified maximum. Among the regulations previously in effect was former Regulation 44-115.61 which expressly declared that "partially free or shared living costs *do not represent income.*" (Emphasis added.)

Determining individual families' needs on the basis of such diverse factors as family composition and geography, however, proved unacceptably inefficient. The Reform Act of 1971 replaced this cumbersome system with a simple, uniform flat grant. The Legislature abolished the administrative allowances and need figures and took upon itself the task of determining the minimum need level of recipients (Welf. & Inst. Code, § 11452). The Legislature itself then set *uniform welfare payments* (Welf. & Inst. Code, § 11450) *based on a fair averaging of all AFDC grants*, a method of welfare benefit computation recently approved by the United

States Supreme Court in *Rosado v. Wyman* (1970) 397 U.S. 397.[4]

The chief purposes of the reform were to streamline the administration of the welfare program[5] and to eliminate welfare paternalism by allowing recipients to allocate grant money according to their own priorities.[6] The Legislature accomplished these purposes by replacing the complicated administrative allowances with flat grants determined solely by family size, and mandating that the full grants be paid without regard to actual expenditures for particular need items. The amount received by each family is now dictated by a schedule adopted by the Legislature and contained in Welfare and Institutions Code section 11450, subdivision

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4. The rationale of the flat grant was aptly described by Judge Weinstein on remand of *Rosado*: "If a family's rent also covers some or all of its utilities costs, this is not now considered to reduce or eliminate its utilities need, which is included in the average basic amount. Rather, the family has made a good buy in shelter, just as when for the same money it gets an apartment with a washing machine, a plot to grow vegetables or a lower cost of transportation." (Rosado v. Wyman (1970) 322 F.Supp. 1173, 1189, affd. (1970) 437 F.2d 619, affd. *sub nom* Wyman v. Rosado (1971) 402 U.S. 991.)

5. The report of the Legislative Analyst projected a $5 million savings in administrative costs and no savings at all in overall grant payments. (See Analysis of the Budget Bill, Report of the Legislative Analyst to the Joint Legislative Budget Committee (1972 Reg. Sess.) p. 724 (Table 2).)

6. The legislation operates in accordance with the "money payment" principle incorporated in the Social Security Act, 42 United States Code, section 606(b); H.E.W.'s Handbook of Public Assistance Administration, section 5120; and California Welfare and Institutions Code section 10501. An eligible recipient receives his or her grant money as a matter of right; the payment is not identified with any particular requirement or requirements considered in arriving at the amount of the payment; nor is the grant money designated for any specific items or purposes. The principle guarantees the autonomy of the recipient and encourages his responsibility in budgeting his limited finances.

(a): "For each needy family which includes one or more needy children . . . there shall be paid . . . an amount of aid each month which when added to his income . . . is equal to the sums specified in the following table. . . ."[7]

Thus, whereas under the pre-1971 practice the administrative agency was primarily responsible for establishing the basic amount of a recipient's grant, the 1971 legislation withdrew the department's authority in this regard and established a schedule of legislatively mandated "flat grants."

Subsequent to the enactment of the 1971 act, the department promulgated a series of regulations purporting to implement the reform legislation. In one of the regulations (Reg. 44-115.9), the department adopted a schedule of housing and utility "allowances," assigning a designated dollar value to housing and utilities assertedly used by different sized AFDC family units.[8] Regulation 44-115.8, the regulation at issue here, provides that whenever this administrative "allowance" figure exceeds the amount of an AFDC recipient's actual pro rata expenditure for housing and utilities, the "excess" amount shall be considered "income" to the recipient; by its terms, the regulation confines its operation to situations in which the AFDC recipient resides in the same household with one or more recipients of "adult

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7. At the time this action was commenced, the table in section 11450 established, *inter alia*, a flat grant figure of $115 per month for a home containing one needy eligible person, $190 for two needy persons, and $235 for three needy persons.

Unless otherwise indicated, all section references are to the Welfare and Institutions Code.

8. Thus, for example, the regulation established a combined housing and utility allowance of $67 per month for one child, $87 per month for two children, and $95 per month for three children.

aid.'"[9] Although the precise rationale of the regulation is not explicitly stated, the regulation appears to be an attempt to measure the "noncash economic benefits" which an AFDC recipient obtains by sharing housing and utilities with an individual who is receiving an independent welfare grant.

As noted above, the central issue in this case is whether Regulation 44-115.8, and more generally the entire "noncash economic benefit" concept, is compatible with the legislative scheme established by the Welfare Reform Act of 1971. As discussed below, we conclude that both the specific regulation at issue and the department's general "noncash economic benefit" theory are in direct conflict with the governing statutory provisions and cannot stand.

3. *The legislative history of the Welfare Reform Act of 1971 demonstrates that Regulation 44-115.8 is incompatible with the governing statutory scheme.*

The most obvious indication that the regulation at issue here does not conform to, or implement, the governing welfare statutes appears from the legislative history of the Welfare Reform Act itself. Senate Bill No. 545 (1971 Reg. Sess.) (also known as the Burgener Bill) included a section (§ 32) requiring that part of the benefits of an ATD recipient living with an AFDC family be deemed available to the AFDC family with a consequent reduction in that

9. At the time this action was commenced, there were three "adult aid" programs in California: Aid to Totally Disabled (ATD), Aid to the Blind (AB), and Old Age Security (OAS).

family's grant.[10] The avowed purpose of this section of the bill was to eliminate a procedure which was attacked politically as providing for "double payments" to recipients of welfare benefits. Section 32, however, met with decisive defeat both in committee and on the Senate floor as a suggested amendment to the bill which ultimately was enacted as the Welfare Reform Act. (Sen. Bill No. 796 (1971) Reg. Sess.).[11]

Thus, while drafting the current statutory scheme, the Legislature directly considered a proposal to reduce grants of AFDC recipients sharing housing with an adult aid recipient, and it explicitly rejected such a proposal. Despite this unambiguous indicant of legislative intent, however, the department subsequently adopted the principal elements of the rejected amendment by promulgating the regulation at issue here. Not surprisingly, a legislative subcommittee has since condemned this very regulation as a blatant frustration of legislative will. (See Senate-Assembly Subcommittee on Implementation of Welfare Re-

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10. The administration's proposed bill would have added a section to the Welfare and Institutions Code which read: "The allowable amount of aid granted pursuant to this chapter to a family which includes a recipient or recipients of [adult aid] . . . shall be determined by reducing the allowable amount of aid determined pursuant to section 11450 by an amount equal to the amount allocated to any item of the minimum basic standard of adequate care considered in determining the need of the recipient or recipients receiving [adult aid] . . ."

11. The Burgener Bill died in the Senate Health and Welfare Committee (see Final Calendar of Leg. Business (1971) Sen. Bill No. 545 (1971 Reg. Sess.)). The next month, section 32 was offered as an amendment to Senate Bill No. 796 and was rejected by the Senate Finance Committee. On July 21, this amendment was offered on the Senate floor and again was rejected (see 3 Sen. J. (July 21, 1971 Reg. Sess.) p. 5245 third set of amend., amend. 12). The same provision was also discussed and rejected during final negotiations on Senate Bill No. 796 which thereafter became the Welfare Reform Act of 1971.

form, Report to the Legislature (March 17, 1972) (Reg. Sess.) pp. 20-21.)

It is axiomatic, of course, that administrative regulations promulgated under the aegis of a general statutory scheme are only valid insofar as they are authorized by and consistent with the controlling statutes. "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (Morris v. Williams (1967) 67 Cal.2d 733, 748; Whitcomb Hotel v. California Emp. Com. (1944) 24 Cal.2d 753, 757.) In promulgating the regulation in question here, the department has ignored this fundamental principle of administrative law, and has arrogated to itself the authority to reject explicit legislative determinations, an authority which is completely incompatible with the basic premise on which our democratic system of government rests.[12] Thus, the Legislature's speci-

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12. In committee hearings conducted by the Legislature after the passage of the Welfare Reform Act, Department of Social Welfare Director Carleson (Swoap's predecessor) was asked to explain the department's policy of initiating regulations despite repeated rejections of the specific concept by the Legislature. The testimony follows:

Mr. Carleson: "Mr. Chairman, I say categorically on all of the questions relating to elements that proposed legislation [*sic*] that were not adopted, we have always said, we have said as clearly as we can before committees that anything we can do administratively we will do whether or not there is legislation."

Chairman Beilenson: "Even if the regulations are specifically rejected?"

Mr. Carleson: ". . . I would say that from the standpoint of any proposed legislation by anyone that if administratively these reforms can be accomplished, we will be doing them administratively and there has been no agreement or commitment to do otherwise."

This dialogue was reprinted in the "Report to the Legislature" by the Senate-Assembly Subcommittee on Implementation of Welfare Reform, March 17, 1972, accompanied by the criticism: "Director Carleson's efforts to usurp the Legislature's policy-making authority has been a disturbing and recurring theme during the implementation of welfare reform." (Report to the Legislature, pp. 20-21.)

fic rejection of the substance of the challenged regulation provides the clearest indication that the measure is not consistent with legislative intent.

4. *Regulation 44-115.8, and the entire "non-cash economic benefit" concept, is in addition totally incompatible with the general principles of the governing "flat grant" system.*

Even if the Legislature had not explicitly rejected the substance of the proposed regulation, we would still conclude that Regulation 44-115.8 is invalid because it is directly at odds with the flat grant system established by the 1971 legislation. As noted above, under the flat grant system the basic amount of an AFDC grant is determined on the basis of family size. In calculating the various flat grant figures included in the schedule of section 11450, the Legislature averaged the diverse needs of *all* AFDC recipients; this averaging took into account the savings accruing to some recipients because of shared housing, as well as the many factors, such as specialized housing or utility needs, which resulted in higher housing costs for other recipients.[13] Under the flat grant approach, the resulting average figure is to be paid to all AFDC recipients *without regard to differing need.*

Because the effects of shared housing have already been considered in establishing the basic grant figures, and be-

13. Although the department now contends that the average figures of section 11450 were based only upon "independent" living arrangements and did not contemplate shared housing, there is absolutely nothing to support such a contention. On the contrary, it is clear that in devising section 11450's flat grant figures, the Legislature relied upon the department's past payment schedule which did not distinguish between independently housed units and AFDC units that shared housing with others. (See former Reg. 44-115.61.)

cause the Legislature explicitly directed that reduced need cannot justify a reduced grant, it is obvious that the present regulation's reduction of AFDC housing is impermissible. Indeed, from this perspective it becomes perfectly clear why the Legislature rejected the "double payment" argument proffered in support of the Burgener Bill provision: because the savings from shared housing had already been considered in setting the flat grant figures, there was no "double payment" to be eliminated. In reality, it is the challenged regulation which would impose an unfair "double deduction" on AFDC recipients who happen to share a household with a recipient of adult aid.

Moreover, when the flat grant figure is viewed in the context of the entire prevailing welfare scheme, the invalidity of the challenged regulation becomes even clearer. The Legislature itself explicitly recognized that the flat grant payments authorized by section 11450 were not adequate to meet recipients' minimum needs; a separate provision, section 11452, sets forth a schedule of minimum needs, which in every case exceeds the flat grant payment for the corresponding family unit.

Thus, since the amount of the uniform payments consciously falls short of the *minimum need levels,* the Welfare Reform Act does not merely encourage thrift by AFDC recipients, it legislates thrift. Unless a family is able to economize in some areas of need, the statutes contemplate the failure of that family to survive. By distributing flat sums without restriction as to use, the Legislature has provided some leeway for families to meet this arduous challenge. *The legislative scheme contemplates that families will find ways to save in one area of need to help meet less flexible expenses generated by another need item.*

The "noncash economic benefit" concept devised by the department to cut welfare costs completely undermines this legislative program. Under the department's approach, whenever a recipient is successful in saving expenses in one area of need, the department asserts that it can consider such "savings" as "income" and can reduce the recipient's grant accordingly. Thus, under the instant regulation, an AFDC recipient who saves on housing costs through shared housing is "rewarded" for his thrift by a *reduction* in his welfare grant. It is not difficult to see that such an approach acts as a direct disincentive to economize; even if he can make do with less, a recipient is encouraged to spend up to the full amount of the agency's arbitrary "allowance" figure. Moreover, the regulation makes it impossible for a recipient to utilize savings on housing costs to bridge the gap between his flat grant payment and his minimum needs. This consequence is another indication that both the instant regulation and the general "noncash economic benefit" concept are incompatible with the flat grant system.

5. *"Noncash economic benefits" do not constitute "income" within the meaning of section 11450.*

The department maintains, however, that the instant regulation does not conflict with the flat grant system, because the regulation represents a reasonable measure of a recipient's "income" which, under section 11450,[14] must be deducted from the flat grant figure. As we shall explain, however, the regulation's characterization of such "benefits"

14. As noted above, section 11450, subdivision (a) provides that: "for each needy family which includes one or more needy children . . . there shall be paid . . . an amount of aid each month which *when added to his income* . . . is equal to the [flat grant figures] specified in the following table. . . ." (Emphasis added.)

as "income," as well as its method of valuing such "income," is fatally flawed.

a. *"Noncash economic benefits," and particularly "shared housing," have never been considered income in the history of California welfare programs and there is no indication that the Legislature intended to alter this approach.*

The department's contention that "noncash economic benefits," such as those involved in the instant case, constitute "income" to a recipient which justifies a reduction of his welfare grant is an entirely novel proposition. Never before in the long history of California's numerous welfare programs have such "benefits" been so designated. Indeed, with respect to the "shared housing" benefit at issue here, a pre-1971 department regulation explicitly declared that "partially free or shared living costs do not represent income." (Former Reg. 44-115.61.)

The department, however, purports to derive authority to transmute shared housing and other noncash economic benefits into deductible "income" from the language of Welfare and Institutions Code section 11008, which provides that "[i]n computing the amount of income determined to be available to support a recipient, *the value of currently used resources shall be included . . . .*" (Emphasis added.) As its context indicates, section 11008 undertakes to reflect only income available for the recipient's support; although imprecisely stated, the "value of currently used resources" has always referred to the *income derived* from such resources. The term "resources" itself has never before referred to anything but real or personal property

which a recipient may retain without forfeiting eligibility for welfare benefits.[15]

Section 11008 itself was enacted in 1965 and was reenacted in 1971 without amendment. At no time prior to 1971, however, did the department ever assert that intangible economic benefits such as the savings derived from shared housing constitute a "resource" or "income" under section 11008 or its precursor. If in revising our state's welfare scheme in 1971, the Legislature meant to convert shared housing into income, such a radical departure from the prior practice would necessarily have been accompanied by a clear expression of legislative intent. Otherwise we must conclude that the Legislature, familiar with the long-standing administrative interpretation of income, manifested its approval by leaving the income provision of section 11008 unchanged. (See California Welfare Rights Organization v. Brian (1971) ..... Cal.3d .....; Coca-Cola Company v. Board of Equalization (1945) 25 Cal.2d 918.)

This conclusion is confirmed by the report of the Legislative Analyst evaluating the financial consequences of the 1971 welfare reform legislation. As noted earlier (see fn. 5, *supra*), the Legislative Analyst projected a $5 million savings in administrative costs but *no savings at all* in substantive grant payments. Had the Legislature intended to convert a large category of previously "non-income" benefits into deductible income, a large savings in grant payments would have been predicted. The analyst's report

15. An AFDC recipient may retain $600 worth of personal property (§ 11257) and an ATD, $1,200 (§ 11154). Real property is governed by sections 11153.7, and 11152 and 11255. (See also §§ 11155 (additional exempt resources) and 11158.)

necessarily implies that no such transformation was intended.[16]

Indeed, if the department's characterization of such benefits as deductible "income" were accepted, the practical effect would be to afford the department broad discretion

16. In his dissenting opinion, my colleague Justice Burke states: "I have no difficulty characterizing as 'income' or 'resources' the actual economic benefits obtained by AFDC recipients whose living expenses are paid, in whole or in part, by other persons . . ." (*Post*, p. .....)* With all respect, I believe this statement demonstrates the numerous flaws in the dissent's argument.

First, the crucial question in this case is not whether we, as judges, or the administrative agency, can conceivably "characterize" the noncash economic benefits at issue as "income," but rather whether the Legislature intended such a characterization. Indeed, Justice Burke's recent opinion for this court in California Welfare Rights v. Brian (1974) 11 Cal.3d 237 explicitly recognizes this distinction, for while the resources of a pregnant woman's body at issue there could in some sense be characterized as "in kind income" (food, shelter) to her fetus, our court held that such a characterization was impermissible because the Legislature had not intended it. For the reasons discussed above, it is clear that, just as in *Brian*, the Legislature did not intend the noncash economic benefits at issue in this case to be considered as deductible income warranting a reduction of a recipient's flat grant payment.

Second, the passage from the dissent quoted above, and indeed the entire dissenting opinion, erroneously assumes that the challenged regulation measures the value of living expenses of AFDC recipients actually paid for by ATD recipients residing in the same household. As I discuss below (*post*, pp. ....-....),** however, the administrative regulation *never* accurately measures the value of such benefits because, by the very nature of the ATD grant, the ATD recipient never has any "excess" resources to give to the AFDC recipients. In reality, by relying upon the department's average allowance figure, the regulation only determines the AFDC recipient's "reduced need" flowing from shared housing, and, as the dissent concedes, "under the express terms of section 11450, the full AFDC grant must be paid to eligible needy persons without regard to their actual expenditure for particular need items. . . ." (*Post*, p. .....)***

*Multilith opinion, page 4.

**Multilith opinion, pages 26-28.

***Multilith opinion, page 10.

to curtail almost *all* payments to AFDC recipients under the guise of "income" because the noncash economic benefits involved here are logically no different than myriad similar benefits available to all recipients. Housing and utilities represent only two of the "need" items enumerated in Welfare and Institutions Code section 11452. The department could easily assert an allowance figure for recreation and deduct from the flat grant whenever the AFDC children actually only played in a free public park or shared a television set with nonrecipients. So, too, could allowances be resurrected for food and medical supplies with consequent deductions for items shared. Yet the fact is that such sharing has always taken place. The Legislature not only knew of this practice but contemplated that such sharing would help bridge the gap between the amount of the flat grant and the recognized minimum need level. We can find no indication that the Legislature intended to permit the agency to seize upon these "economic benefits" so as to undermine the integrity of the legislatively established flat grant figure.

b. *Welfare and Institutions Code section 11006 precludes the department from treating any portion of adult aid benefits as "income" of AFDC recipients.*

Moreover, aside from the general impropriety of treating shared housing or similar benefits as "income," such characterization is clearly impermissible in the instant case by virtue of Welfare and Institutions Code section 11006. Section 11006 explicitly prohibits the imputation of any of an adult aid recipient's benefits as income to anyone else: "Aid granted *shall not be construed as income* to any person other than the recipient." (Emphasis added.) It seems clear that the Legislature, in establishing this

prohibition, intended to protect the full grant mandated for other welfare recipients, such as the AFDC children involved in the instant case. Regulation 44-115.8, by in effect designating some portion of an adult aid recipient's housing benefits[17] as "income" to AFDC recipients residing in the same household, directly conflicts with this legislative mandate. Accordingly, on this basis alone, the regulation cannot stand.

c. *In any event, the regulation is invalid because it does not measure the actual value of a recipient's benefits but instead assigns a fictional value to this asserted "income."*

Finally, even if the economic benefits of shared housing could properly be considered "income," the challenged regulation would still be invalid for it does not measure the *actual* value of a recipient's benefits but instead assigns a fictional value to such benefits. Numerous cases of the United States Supreme Court have clearly established that under the governing provisions of the federal Social Security Act only a recipient's *actual* available income may be deducted from his basic welfare benefit; arbitrary or constructive "presumptions" of income are not permissible (Lewis v. Martin (1970) 397 U.S. 552; King v. Smith (1968) 392 U.S. 309. See 42 U.S.C. § 602(a)(7); 45 C.F.R. §§233.20(a)(3)ii(c) and 233.90; Handbook of Public Assistance Administration, Part IV, § 3120 et seq.)

Under the regulation before us, a recipient's "income" from shared housing and utilities is calculated by subtracting the recipient's actual pro rata expenditure from the

17. The adult aid benefits at issue are granted only to the individual adult residing in each household, *not* to a "recipient group." The suggestion to the contrary in Justice Clark's dissent is simply fallacious.

fixed "allowance" figure devised by the department. Thus, the regulation does not seek to determine the *actual* value of a recipient's present housing and utility resources, but instead simply presumes that every recipient's resources are equal in value to the department's average allowance figure. The *Lewis* and *King* cases cited above demonstrate the invalidity of such an approach. No matter how accurately an allowance figure may reflect the *average* cost of housing and utilities for welfare recipients throughout the state, it is still an impermissible presumption as to the value of these items received by any one recipient.[18] Only the *actual value* of housing and utilities benefits received could possibly constitute income to the recipient, and this the regulation does not measure.

Indeed, the present case provides perhaps the clearest illustration of the arbitrary manner in which the department's fixed allowance operates. At the time this action was

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18. The very recent United States Supreme Court decision in Shea v. Vialpando (1974) .... U.S. .... [(April 23, 1974) 42 U.S.L. Week 4559] explains that under the federal Social Security Act a recipient's income, as well as income-related expenses, must be determined on an individual, rather than an average, basis. The *Shea* court declared: "[I]t has consistently been the practice to compute the income of an AFDC applicant on an individual basis. [¶] From the inception of the act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* [original emphasis] case after other income and resources are considered. . . . For example, HEW's broad definition of "earned income" . . . demonstrate[s] its view that the determination of need in such case *is to be based upon an amount of the particular individual's available income and resources.* [Emphasis added.] . . . Thus if income and expenses related to the production of income are to be treated alike . . . both must be considered on an individualized basis." (Fn. omitted.) (.... U.S. at p. .... [42 U.S.L. Week at 4562-4563].) Pursuant to this analysis the *Shea* court invalidated a state welfare provision which limited a recipient's "work-related expenses" to an average, standardized figure.

instituted, ATD recipients such as Mrs. Cooper and Mrs. Palladino received as a housing allowance, an amount which, at most, equalled the ATD recipient's pro rata share of actual housing costs. (See former Welf. & Inst. Code, §§ 12151, 12651, 13700.) Because the ATD housing grant was limited to the recipient's pro rata share, there were never any "excess" benefits which could properly be considered as paying for part of the AFDC recipient's housing costs. Thus the nature of the ATD grant itself precluded the generation of any "income" of AFDC recipients sharing a household with an ATD recipient. Despite these economic realities, however, the regulation at issue here, by utilizing the department's fictional "allowance" figure, attributed substantial income to both the Cooper and Palladino children, improperly reducing the already meagre grants on which the children must seek to survive.[19]

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19. Justice Clark's dissent rests entirely upon the totally erroneous premise that the "noncash economic benefit" concept underlying the challenged regulation is equivalent to "in-kind income." As we have explained, however, unlike true "in-kind income," the department's "economic benefit" concept does not reflect *actual* income (commodities or cash) received by a recipient, but instead attributes "constructive" income to a recipient who, through such economizing conduct as sharing housing, manages to spend less money monthly than the department's hypothesized average. A recipient who saves on housing costs by sharing a household with others, and who in the department's eyes thereby realizes "noncash economic benefits," is a far cry from a recipient who receives free housing (i.e., actual "in-kind income") or cash from a willing and able donor. (See Waits v. Swoap, *post*, p. ...., fn. 6.)* Accordingly, the dissent's reliance on federal and state provisions concerning actual "in-kind" income is misplaced. In short, Justice Clark simply fails to comprehend the regulation's serious distortion of the "in-kind income" concept. Furthermore, the scattered and random allegations of "misstatements" ascribed to the majority opinion by Justice Clark are neither borne out by the record nor worthy of refutation.

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*Multilith opinion, p. 10, fn. 6.

6. *Conclusion.*

To reiterate, we have concluded that the regulation at issue in incompatible with the governing statutory provisions and therefore invalid. As we have seen, the Legislature, in drafting the Welfare Reform Act of 1971, explicitly rejected a provision identical in substance to the proposed regulation; we have also explained that such rejection was quite predictable in view of the fact that the "noncash economic benefit" concept on which the instant regulation rests is itself completely at odds with the flat grant system adopted by the 1971 legislation. Although the department defends the regulation as a proper measure of deductible income, we have demonstrated that such a characterization flies in the face of established practice as well as the explicit provisions of Welfare and Institutions Code section 11006. Finally, we have demonstrated that, in any event, the department's abstract "allowance" figures constitute an impermissible measure of income for they fail to measure the actual value of benefits received by any recipient.

The department's desire to cut welfare expenses at any cost has led it to disregard the clear guidelines of its legislative mandate and to construct a contrived and tortured concept of "income" in an attempt to camouflage an impermissible administrative reevaluation of AFDC recipient's needs. An analysis of the complexities of the department's novel determination of "income" is reminiscent of a journey into the fictional realms visited by Alice through the looking glass. In the fanciful world of Lewis Carroll, the inhabitants could turn fact into fiction and fiction into fact by mere ipse dixit. As Humpty Dumpty scornfully informed Alice, "When I use a word, it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "Whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Like Humpty Dumpty, the department confronts us with the question "which is to be master"—the department or the Legislature? The department's position is as precarious and untenable as Humpty's seat on the wall.

"Through the Looking-Glass" dealt with a fictional child. The tragedy of the instant case is that the department's regulation, born of a fictional "allowance" construct, has brought all-too-real hardships to very real children. An administration of the welfare program that discards statutory mandate to reduce relief to the indigent young cannot be sustained. A society that sacrifices the health and well-being of its young upon the false alter of economy endangers its own future, and, indeed, its own survival.

We conclude that Regulation 44-115.8 is invalid. The judgment is reversed and the case remanded to the superior court for further proceedings consistent with the views expressed herein.

TOBINER, J.

We Concur:

WRIGHT, C. J.

MOSK, J.

SULLIVAN, J.

No. 1

COPY COOPER v SWOAP Sac. 7985

DISSENTING OPINION BY BURKE, J.

I dissent. The solution of this case and its companion, *Waits v. Swoap, post,* page ...., simply requires the application of common sense. The Legislature, acting pursuant to the mandate of federal law,[1] has specified that the amount of a welfare grant payable to an AFDC recipient must be reduced by the amount of any "income" or "resources" available to him. (Welf. & Inst. Code, §§ 11450, subd. (a), 11008.) For example, if an aid recipient regularly receives $50 in cash each month from a friend or relative, that amount must be deducted from his grant—the majority presumably would concede this is so. The obvious reason for requiring the deduction of "income" or "resources" from a recipient's grant is to assure that the state's limited welfare funds are allocated only to those who truly are in need of aid. It seems unquestionable to me that this is a legitimate, rational state interest which must be given effect by the Department of Social Welfare and this court.

The Legislature, however, has made no attempt to define the term "income," other than to state that it includes "the value of currently used resources." (Welf. & Inst. Code, § 11008.) Instead, the Legislature has entrusted the department (not this court) with the task of establishing regulations "not in conflict with the law" which fix statewide standards for the administration of all state or federally assisted aid programs. (*Id.,* § 10604, subd. (b)), and which "implement, interpret, or make specific" the applicable

1. Under federal law, a state AFDC plan must take into consideration any nonexempt income and resources of an aid recipient. (42 U.S.C. § 602, subd. (a) subsec. (7).) HEW regulations implementing this provision state that "only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered . . ." in establishing eligibility and the amount of the assistance payment. (45 C.F.R. § 233.20, subd. (a), subsec. (3)(ii)(c).)

statutory provisions (*id.*, § 10554). Accordingly, the department has enacted various regulations designed at defining and implementing the broad terms "income" and "resources" used by the Legislature.

These regulations acknowledge the undisputed economic fact that a person has "income" or "resources" when he receives *something of value* besides cash, something which gives him a financial advantage over another and reduces his economic needs. (See, e.g., Treas. Reg. 1.61-1(a).) Thus, Regulation 44-101 defines "income" as any benefit in cash *or in kind* which is in fact available to the individual, and Regulation 44-101.8 defines "in-kind income" as any benefit received other than in cash, including the value of need items provided at no charge. And Regulation 44-115.9 sets forth the department's estimated in-kind income value of housing, utilities, food and clothing furnished to an aid recipient, for purposes of fixing uniform values for such need items.[2]

In *Waits v. Swoap, post,* page ...., the "something of value" sought to be taken into consideration by the department was *free housing* regularly furnished to children living with nonneedy relatives. In the instant case, what is

2. Contrary to the majority, these figures are neither "fictitious" nor "arbitrary." Instead, they represent the department's estimates of actual value, based upon actual costs developed by a 1970 survey and prorated on the basis of the total maximum aid payments specified in section 11450, subdivision (a) of the Welfare and Institutions Code. Thus, of the total maximum AFDC aid of $117 per month available for one needy person under section 11450, the department has allocated $55 for housing, $12 for utilities, $29 for food and $9 for clothing. (The remaining $12 presumably represents incidental items not included for purposes of evaluating in-kind income.) Certainly, the department is entitled, for purposes of administrative convenience, to make a reasonable, uniform estimate of the value of need items furnished to aid recipients, and plaintiffs have not asserted that these figures are unreasonably large.

involved is *reduced housing expense* attributable to a shared expenses arrangement with other welfare recipients. In both cases, as in the hypothetical case involving a regular $50 cash gift, aid recipients are receiving economic benefits which directly reduce their cost of living and which, under any rational system, should be taken into consideration in determining the size of the assistance grant. The majority's refusal to acknowledge that noncash economic benefits such as free or reduced rent constitute "income" underscores the appropriateness of their reliance (opn. p. 28) upon Humpty Dumpty's admonition to Alice that "When I use a word, it means just what I choose it to mean—neither more nor less." In my view, "income" is realized in all three situations, and our only concern should be to assure that the department's regulations accurately calculate the amount of income to be deducted from the grant in each situation.

As indicated above, I have no difficulty characterizing as "income" or "resources" the actual economic benefits obtained by AFDC recipients whose living expenses are paid, in whole or in part, by other persons, including recipients of other categorical aid. For example if an AFDC family subleased a room in their home for $50 a month, unquestionably some, if not all, of that amount could be considered "income" which could be deducted from the AFDC grant. In the instant case, the AFDC recipient family members share housing and utilities expenses with recipients of "adult aid," thereby presumably reducing the amount of funds the former recipients otherwise would require to meet these expenses. Since AFDC recipients living with recipients of adult aid constitute a general class of persons who have economic advantages which other AFDC recipients do not have, the department properly may character-

ize this economic advantage as a "resource" for purposes of computing the grant.[3]

The majority, disputing that "resources" or "income" exist in this situation, claim that under California's present "flat grant" system whereby aid is paid to needy persons in accordance with a table of maximum grants without regard to individual recipient needs (Welf. & Inst. Code, § 11450), the Legislature has already considered and "averaged" into these grant figures possible shared housing arrangements. The majority assert that since the Legislature has taken into account such arrangements in computing the maximum grants, the department's regulation in effect accomplishes a double reduction in grant size. On the other hand, the department disputes the assertion that the Legislature considered shared housing arrangements; according to the department, it is more likely that the maximum grant schedules were prepared on the assumption of "independent living arrangements." Although the legislative history is inconclusive on the question, I think it is significant that the Legislature expressly required that "income" (defined to include "resources" under § 11008) be deducted from the maximum grant figure, without attempting to narrow the scope of the quoted terms, and without expressly excluding such income-generating devices as shared housing.

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3. Principles of equal protection would not prohibit the state, in allocating its limited welfare funds, from drawing rational distinctions based upon the differing needs of various classes of recipients and adjusting the size of its grant payments accordingly. As stated in Jefferson v. Hackney, 406 U.S. 535, 546-547, "so long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

Thus, the United States Supreme Court has recently noted that, "From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered. Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account, and this individualized approach has been reflected in the implementing regulations." (Fn. omitted, Shea v. Vialpando, ... U.S. ....., ... [42 U.S.L. Week 4559, 4562].)

The majority rely upon language in section 11006 of the Welfare and Institutions Code that money paid to an aid recipient "is not for the benefit of any other person," and "shall not be construed as income to any person other than the recipient. . . ." Yet the challenged regulation does not assume that any part of the grant paid to a recipient of adult aid constitutes income to the AFDC recipient family members; the regulation, properly construed, only comes into play when grant funds are subsequently *used* by the adult aid recipient to pay housing and utilities expenses which otherwise the AFDC recipients would be required to meet.

For example, assume that an ATD recipient actually gave $50 of his aid funds to assist an AFDC family in meeting their own expenses. Clearly, that amount properly could be considered "income" or a "resource" of the AFDC family, and deducted from the AFDC grant, despite the origin of those funds. Similarly, when an ATD recipient contributes a portion of ATD funds in a shared expenses arrangement with an AFDC family, it seems reasonable to

consider at least part of the contribution a "resource" of the AFDC family, *if* the contribution results in an actual savings to that family.

Finally, the majority overlook the evident implication of section 11010 of the Welfare and Institutions Code that the department properly may consider, in determining the amount of the AFDC assistance grant, voluntary contributions or grants from "public sources, private agencies, friends or relatives" if the service to be provided by such contributions or grants (such as housing and utilities expenses) are covered by an AFDC assistance allowance. Housing and utilities are needs which are included within the AFDC assistance allowance (Welf. & Inst. Code, § 11452).

I would hold, therefore, that the department had the authority to assign a reasonable value to the "resource" created by a shared expenses arrangement.[4] On the other hand, it appears that, in certain of its applications, the

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4. The majority also point out that (1) at some time prior to 1971 the department had adopted a regulation, now repealed, to the effect that shared living costs do not represent "income" to an aid recipient, and (2) in 1971 the Legislature failed to pass proposed legislation (the so-called "Burgener Bill") to reduce the grant to AFDC families residing with adult aid recipients. Similar factors led us to invalidate an "in-kind income" regulation which would have reduced the AFDC grant to pregnant mothers. (California Welfare Rights Organization v. Brian, ... Cal.3d .....) In *Brian*, however, the department had formerly adopted a long-standing and controversial administrative policy of treating the unborn child as a "person" for purposes of computing the AFDC grant; the Legislature's repeated refusals to reverse this long-standing policy confirmed our conclusion that the department's new regulation (treating the mother's body as a "resource" of the fetus) violated probable legislative intent. The instant case involves no abrupt change of long-standing policy, and the defeat of the "Burgener Bill" is not conclusive evidence of a contrary state policy, given the existing legislative mandate to consider "income" and "resources" of an aid recipient (Welf. & Inst. Code, §§ 11008, 11450).

department's regulation may result in an impermissible overvaluation of that resource. Referring to the facts in the instant case, apparently Mrs. Cooper's actual contribution to the family's housing expenses was only $14, yet the regulation required a grant deduction of $31. It seems evident that "income" or "resources" in the amount of $31 could not have been generated by a $14 contribution, and that accordingly the regulation's formula has substantially overvalued the "resource" available to the AFDC recipients by reason of the shared expenses arrangement. A simple calculation will verify that such overvaluation occurs only when the AFDC recipients' hypothetical "allowance" for housing and utilities expenses exceeds the total amount paid by the combined ATD-AFDC family for these items.

In reality, therefore, Regulation 44-115.8 may operate to penalize an AFDC family for its thrift and its ability to spend less AFDC funds for housing and utilities than the department has allocated to it for these items. In other words, at least part of the grant reduction may be attributable to the family's reduced spending, rather than the existence of "income" or "resources." Yet, under the express terms of section 11450, the full AFDC grant must be paid to eligible needy persons, without regard to their actual expenditures for particular need items; the department's sole authority for making a deduction from that grant would be the existence of "income" or "resources." Therefore, in order to comply with state statutory provisions, under no circumstances should the amount of the grant reduction exceed the amount actually contributed by the adult aid recipient to defray the AFDC recipients' expenses.

It is arguable, of course, that Mrs. Cooper's situation is not typical, and that ordinarily an AFDC-ATD family will

be unable to obtain housing at a cost substantially lower than the department's "allowance," which itself is an estimate of the *minimum* necessary to fulfill that need. For example, had the Cooper family spent $102 per month, rather than $84, on housing and utilities, the grant reduction ($16) would not exceed the amount ($17) contributed by Mrs. Cooper from ATD funds as her one-sixth share of actual cost.[5]

Yet even in a situation wherein the grant deduction does not exceed the amount contributed by the adult aid recipient, the regulation may overvalue the "resource" derived from shared expenses. The department has argued that "All these regulations do is recognize the economies of scale, i.e., the more individuals that reside in a given living unit the lower the per individual cost. [¶] Or to phrase it in its most familiar terms, 'two can live as cheaply as one.' *Strictly speaking this bromide is not wholly accurate,* but 'economies of scale' is a valid description of the realities at the heart of the cost of living." (Italics added.) The reason, of course, why the "bromide" is inaccurate in a shared housing situation is that the presence in the home of an additional "cost-sharer" such as Mrs. Cooper might well *increase* the costs which must be shared; the presence of an additional person could require a larger house at a higher rent, and could lead to increased utilities expense as well. (See People v. Gilbert, 1 Cal.3d 475, 478, fn. 1.) Thus, it is not necessarily reasonable to assume that the entire contribution of an adult aid recipient toward shared expenses constitutes a "resource" of the AFDC recipient members — some allowance reasonably should be made

5. Under Regulation 44-115.8, the Cooper children's five-sixth share of the $102 monthly expense would be $85. As the department's "allowance" for such expenses is $101 for five persons, the difference ($16) would be deducted from the AFDC grant.

to account for any increased costs attributable to the shared expenses arrangement.[6] Yet, unlike the regulation involved in *Waits v. Swoap, post* (dependent children living with nonneedy relatives), the instant regulation makes no express provision for a showing of such increased costs.[7]

Thus, I would conclude that plaintiffs have established that, as applied to certain families, the regulation at issue may overvalue the resource of shared housing. On the other hand, it seems evident that, as applied to many families, the regulation will not result in an improper evaluation. As a general rule, the same principles of construction which apply to statutes likewise govern the construction of administrative rules and regulations. (Cal. Drive-in Restaurant Assn. v. Clark, 22 Cal.2d 287, 292.) One such principle is that, to the extent possible, we must give effect to a statute, "and the fact that it may not be possible to give it effect in one class of cases is no reason for not giving it effect in other cases where it is possible." (Hodge

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6. The *Gilbert* case, *supra*, supports this view. In *Gilbert*, defendant was charged with fraudulently obtaining excess AFDC aid, based on the fact that she failed to report certain contributions made to her by one Branch, who lived with her. We noted that, under the department's own regulations, "To be considered in determining the AFDC payment, income must, in fact, be currently available to needy members of the family in meeting their needs during the budget period." (Reg. 44-101.) Accordingly, we noted that "Branch's presence in the household had forced defendant to move to a larger, more expensive apartment. Since defendant's share of the rent at the new apartment almost equalled her rent at the old apartment, Branch's 'contribution' to the rent afforded no income to defendant, but was payment by Branch of an additional expense incurred by defendant on his behalf." (1 Cal. 3d at p. 478, fn. 1.)

7. In *Waits*, the department's regulations assume that the entire contribution by nonneedy relatives of housing and utilities (valued by the department's "allowance" tables in Reg. 44-115.9) should be deducted from the AFDC grant to dependent children in the care of those relatives, but additionally permitted the relatives a credit against the reduction for any increased costs attributable to the child's presence in their home. (Reg. 44-115.611.)

v. McCall, 185 Cal. 330, 335.) A statute or regulation may be invalid as applied to one set of facts, yet valid as applied to another. (Ferrante v. Fish & Game Commission, 29 Cal. 2d 365, 373.) I believe it would be proper, in the instant case, to sustain Regulation 44-115.8 to the extent it does not result in an improper overvaluation of the resource in question.

Accordingly, I would hold that Regulation 44-115.8 is valid on its face but may not be applied in such a manner as to achieve a reduction of the AFDC grant in excess of the net contribution of the adult aid recipient family member. By "net contribution," I mean the actual cash contribution to housing and utilities expenses less any increased housing and utilities costs attributable to the presence of the adult aid recipient in the home.[8] For example, in Mrs. Cooper's case, the AFDC grant reduction would be limited to $14, assuming that the evidence discloses that this was the amount of her actual contribution toward housing and utilities. The Cooper family would have the opportunity of showing that Mrs. Cooper's presence in the home resulted in increased housing and utilities expenses which justify an appropriate credit to the $14 grant deduction.

BURKE, J.

I Concur:
McCOMB, J.

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8. As I suggested in my dissent in *Waits v. Swoap, post,* pages ....-...., It is reasonable to place the burden of establishing such increased costs upon the aid recipients themselves, rather than upon the department, since such information is more readily available to them. (See also People v. Gilbert, *supra,* 1 Cal.3d 475, 484, and fn. 14.)

COPY COOPER v SWOAP Sac. 7985

DISSENTING OPINION BY CLARK, J.

While I concur in Justice Burke's dissent and its "application of common sense," I feel compelled to further respond to unfortunate statements in the majority's opinion.

The issue of this case is whether in-kind income — or noncash economic benefits — are to be considered as income which will be applied in computing a welfare grant and whether all of the resources furnished to the multigrant household may be considered in determining the family needs from government.[1] In discussing these issues, the majority not only ignores and misinterprets applicable law but also makes several factual errors.

Exemplifying the majority's misunderstanding of the factual setting, the opinion indicates (*ante*, p. ....)* that at the time of the Welfare Reform Act of 1971, a regulation (44-115.61) was in effect "which expressly declared that 'partially free or shared living costs *do not represent income.*' (Emphasis added.)" Actually, this regulation was revoked on 1 June 1969, more than two years before welfare reform. A succeeding version of the regulation was

1. Regulation 44-115.8, challenged in this case, provides that when one or more recipients of AFDC reside in the same household with one or more recipients of adult aids, if the recipient's (either adult aid or AFDC) housing and utilities allowance exceeds his share of the actual cost of housing and utilities (including telephone), the excess shall be considered in-kind income and be taken into consideration in computing the grant. Each recipient's share shall be calculated by dividing the total actual cost of housing and utilities (including telephone) by the number of persons (adults and minors, needy and nonneedy) residing in the household.

*Majority opinion, page 7.

revoked on 1 July 1970, and the concept abandoned.[2] The majority also states that noncash economic benefits "have never been considered income throughout the entire history of California's welfare system, and we can find absolutely no indication that the Legislature intended to alter its consistent treatment of such 'benefits.'" (*Ante*, ..., ...)** In fact, in-kind income had long before the enactment of the Welfare Reform Act been recognized as income not only by the Department of Social Welfare,[3] but also by the Legislature in section 11009.1 of the Welfare and Institutions Code.[4]

The Legislature at the time of the enactment of welfare reform was undoubtedly aware of the department's existing policy of subtracting income — in cash or kind — from the standard to obtain payment level. That the Legislature did nothing to attempt to change this ongoing policy of

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2. For a helpful discussion of the administrative, legislative, and litigative history of California's welfare reform program, see Zumbrun, Momboisse and Findley, *Welfare Reform: California Meets the Challenge* (1973) 4 Pacific L.J. 739, relied on throughout this opinion. The authors are members of the Pacific Legal Foundation, a nonprofit, public interest legal firm recently founded in Sacramento. Pacific Law Journal (University of the Pacific (McGeorge School of Law)) specializes in the analysis of significant California legislation.

**Majority opinion, pages 3, 4.

3. Section 44-115 of Manual of Policies and Procedures preserves the treatment of in-kind income. That section can be traced to a regulation in effect in 1963.

4. Section 11009.1 states:
"The value of free board and lodging supplied to a recipient during a temporary absence from his home of not more than one month, shall be considered an inconsequential resource and shall not be deducted from the amount of aid to which the recipient is otherwise entitled. [¶] After an absence of one month, free board and lodging shall be considered income to the extent the value exceeds the continuing cost to the recipient of maintaining the home to which he expects to return."

deducting income in cash and kind, but instead wrote it into the flat grant statute (Welf. & Inst. Code, § 11450, subd. (a)) reasonably evidences a legislative intent to retain the policy.

With regard to legislative intent, the majority opinion states (*ante*, p. ....):* "The most obvious indication that the regulation at issue here does not conform to, or implement, the governing welfare statutes appears from the legislative history of the Welfare Reform Act itself."

The majority then discusses Senate Bill No. 545 (1971 Reg. Sess.) and particularly section 32.[5] Heavy reliance is placed on the fact that section 32 was not enacted into law. The majority then concludes that because the Legislature rejected section 32, it rejected the noncash economic benefit theory and the principle underlying Regulation 44-115.8.

Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1968) 263 Cal.App.2d 41, 57-58, holds that unpassed bills relating to an act already in effect have little value as evidence of legislative intent. Indeed, it is improper for the majority here to isolate section 32 of Senate Bill No. 545 to glean legislative intent when it is considered that the entire bill failed to meet the legislative approval, and Senate Bill No. 796, which we consider today, was finally enacted into law. (No inference is drawn from this fact, however, and logically so, that welfare reform in general was rejected by the Legislature, yet the same reasoning is applied to section 32.)

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*Majority opinion, page 12.

5. Section 32 of Senate Bill No. 545 provided for reductions in aid when there is a shared living arrangement between an AFDC recipient and recipients of the former adult aid welfare programs.

The majority emphasizes that section 32 was reconsidered as an amendment to Senate Bill No. 796 at least twice and was discussed and rejected during negotiations on this bill, which thereafter became the Welfare Reform Act of 1971.[6] This reconsideration, apart from Senate Bill 545, the majority states is an "unambiguous indicant of legislative intent" whereupon it is concluded that the regulation in question, similar in substance to section 32, is inconsistent with legislative intent.[7]

Failure to adopt section 32 does not necessarily signify rejection of the underlying principle. It is common knowledge that legislative acts are often borne out of compromise and necessity. With regard to necessity, it has been pointed out here that the Legislature had knowledge of the department's pre-welfare reform treatment of in-kind income. The rejection of section 32 could thus be seen as acquiescence in the department's treatment of in-kind income and the director's interpretation of pre-welfare reform law authorizing such in-kind income deductions. That the concepts underlying section 32 were already embodied in existing law and practice is a more logical basis for explaining the failure of section 32 to be enacted into law. In any event, the majority emphasis on section 32 is entirely misplaced.

While it is evident the majority misunderstands the history behind in-kind income statutes, it is also evident the opinion suffers from a basic misunderstanding of the pres-

6. Majority opinion, *ante*, page ...., footnote 11.*

7. *Ibid.*, page ....**, footnote 15.

*Majority opinion, page 13, footnote 11.

**Majority opinion, page 13, footnote 15.

ent and pre-reform systems in general. The welfare system has always made a sharp distinction betweed *need* and *income*. Prior to the adoption of the Welfare Reform Act, the former Department of Social Welfare utilized a schedule of coded AFDC costs whereby each specific need of every member of the family budget unit had to be identified and aggregated. Total aid payments were limited, however, by a statutory maximum which varied depending on the number of needy children in the home. (Welf. & Inst. Code, § 11450, subd. (a).)

With the enactment of the Welfare Reform Act, the California Legislature changed to a flat grant aid system whereby, rather than aggregating each specific need, a statutory grant schedule was provided which varied depending on the number of eligible needy persons in the family. Recognized income, including currently used resources, would be subtracted from the new grant schedule in determining the actual cash payment. (Welf. & Inst. Code, §§ 11008, 11450, subd. (a).)

When the Legislature averaged out need, it by no means required the department to pay the same amount of grant to all recipients having the same size family. On the contrary, it specifically required the department to continue its existing practice of considering the recipient's income, in cash or kind, and deducting it from the standard to obtain grant level.

Thus, although need was determined with reference to a flat grant schedule of average needs instead of an aggregation of individual needs, the amount of the welfare grant has consistently reflected income of the recipient.

In the welfare context, then, income, whether in-kind or cash, does not have the effect of reducing *need*—it reduces the *amount* of the welfare grant. This is evidenced in the

language of the flat grant statute which provides in pertinent part: ". . . [T]here shall be paid . . . an amount of aid each month which *when added to his income* . . . is equal to the sums specified in the following table, . . ." (Welf. & Inst. Code, § 11450, subd. (a); italics added.) The majority therefore is in serious error (*ante*, p. ....)* when it states that ". . . the Legislature took it upon itself to set fixed grant levels to be paid to *all* recipients without regard to individual need."

Additional error in the majority opinion is seen in the discussion of the maximum payment standard established by section 11450, subdivision (a), as contrasted to the higher minimum basic standard of adequate care established in section 11452. In melodramatic fashion it is stated: "Thus, since the amount of the uniform payments consciously falls short of the *minimum need levels*, the Welfare Reform Act does not merely encourage thrift by AFDC recipients, it legislates thrift. Unless a family is able to economize in some areas of need, the statutes contemplate the failure of that family to survive." (*Ante*, pp. ...., ...)**

This statement overlooks the fact that the difference between maximum aid (§ 11450) and minimum basic standards of adequate care (§ 11452) was in no way meant to coerce families into shared living arrangements. Instead, the Legislature set to establish the difference as the bonus value of food stamps.[8] The formula was that grant plus income equals minimum basic standard of adequate care.

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*Majority opinion, page 3.

**Majority opinion, pages 17, 18.

8. Zumbrun, Momboisse and Findley, *Welfare Reform: California Meets the Challenge* (1973) 4 Pacific L.J. 739, 748-749.

And in order that there would never be any failure of a family to "survive" because of a maximum aid level lower than need, the Legislature provided (Welf. & Inst. Code, § 11453.1) that in the event federal law was amended so as to preclude food stamp benefits to welfare recipients, the bonus value of food stamps would be paid to a recipient family in addition to its maximum aid grant. In other words, the Legislature guaranteed welfare recipients that their full needs would be met either by a combination of grant plus food stamps or, if food stamps were abolished, by increasing the grant by the bonus value of food stamps.

Significantly, recognition of in-kind income is required both by state and federal law. The majority states (*ante*, p. ....)* that " 'noncash economic benefits' do not constitute 'income' within the meaning of section 11450," but if they do not, then section 11450 does not conform with the rest of state and federal law. Welfare and Institutions Code section 11009.1 specifically requires the consideration of in-kind income or noncash economic benefits in the form of free board or lodging except when of a temporary nature. The court's unwarranted interpretation of section 11450 would silently overrule the mandate of section 11009.1.

Moreover, misapplication of state law is particularly noticeable in the majority opinion in the edited reliance on section 11006. The majority quotes this section as providing: " 'Aid granted *shall not be construed as income* to any person other than the recipient.' " Although the majority's punctuation would lead one to believe that this is a complete quotation, it is not. The entire sentence in the section reads: "Aid granted shall not be construed as income to any person other than the recipient *or, in the case of a re-*

*Majority opinion, page 19.

cipient group, the recipient group." (Italics indicate portion of sentence omitted by majority.)

The significance of the omitted portion is of direct relevance because this case deals with a recipient group—specifically a family some of whom are recipients of AFDC and some of whom are recipients of an adult category of aid. Thus, section 11006 not only does not prohibit attributing aid as income to the members of a multi-category recipient group, such as the Cooper family; it contemplates such attribution in specific language.

In addition, section 11008 requires that, in computing the amount of income determined to be available to support a recipient, the value of currently used resources shall be included.

These state statutes comply with federal law (42 U.S.C. 602(a)(7)) requiring the state, in determining the amount of a welfare recipient's need, to take into consideration any income or resource of any child or relative claiming AFDC eligibility. Also, section 1612(a)(2) of the Social Security Act not only provides in general that in-kind income be taken into consideration, but more specifically provides a formula for assigning a dollar value to the provision of support and maintenance received while living in another's household. The majority's decision will cast doubt on provisions of the Social Security Act itself and open a Pandora's box for welfare recipients.

The majority holding that "noncash economic benefits" do not constitute "income" within the meaning of section 11450 would exclude a portion of the recipient's income that is required to be considered under federal law. Such a result is in total disregard of the requirements of federal law

and places the state's welfare plan in jeopardy.[9] Rather than to place the state in such predicament, this court should adopt the only logical conclusion—that income in-kind is income in fact, and that both state and federal law require it to be considered as such.[10]

The majority states (*ante*, p. ....)* that "a recipient's 'income' from shared housing and utilities is calculated by subtracting the recipient's actual pro rata expenditure from the fixed 'allowance' figure devised by the department. Thus, the regulation does not seek to determine the *actual* value of a recipient's present housing and utility resources, but instead simply presumes that every recipient's resources are equal in value to the department's average allowance figure."

This criticism would be justified if the department determined the pro rata share by dividing the average or standard of housing and utilities cost by the number of persons in the recipient group. However, by dividing the "total *actual* cost of housing and utilities" (Reg. 44-115.82; italics added), there is no arbitrary or constructive "presump-

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9. Welfare and Institutions Code section 11003 provides: "If the United States Department of Health, Education, and Welfare issues a formal ruling that any section of this code relating to public assistance cannot be given effect without causing this state's plan to be out of conformity with federal requirements, the section shall become inoperative to the extent that it is not in conformity with federal requirements."

10. The pervasiveness of the concept of in-kind income in the federal welfare system is exemplified in section 1612(a)(2) of the Social Security Act which defines unearned income as including ". . . support and maintenance furnished in cash or kind. . . ." and specifies a formula for computing the value to a recipient of a shared living arrangement. The majority should note that this definition of in-kind income is also applied in the context of a flat grant program.

*Majority opinion, page 26.

tion" of income of the type alluded to in Lewis v. Martin (1970) 397 U.S. 552 or King v. Smith (1968) 392 U.S. 309. The use of actual cost of housing and utilities in the formula provides for an individualized determination of income in each case.[11]

Furthermore, state law provides that the director is the only person authorized to adopt regulations to implement, interpret or make specific the law enacted by the department.[12] It must be realized that the defendant not only has the authority, but has the duty to adopt regulations, to implement or interpret the laws administered by him. In effect, the defendant is mandated by statute to establish the value of currently used resources. The method of computing the value of this in-kind income is a question for the defendant as the Director of the Department of Social Welfare. Pursuant to the proper exercise of his authority, the director amended Regulation 44-115.8 to implement, interpret, and make specific the application of section 11008 to multi-grant households.

The principle is well-established that courts will not ordinarily overturn the quasi-legislative acts of an administrative agency which are not clearly arbitrary or capricious. (Ralph's Grocery Company v. Reimel (1968) 69 Cal.2d 172, 179; Pitts v. Perluss (1962) 58 Cal.2d 824,

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11. Justice Burke aptly points out in his dissenting opinion (*ante*, p. ...., fn. 2)* the allowance figure is neither "fictitious" nor "arbitrary." The values assigned represent the department's estimates of actual value, based upon actual costs developed with reference to a 1970 survey and prorated on the basis of the total maximum aid payments specified in section 11450, subdivision (a), of the Welfare and Institutions Code.

12. Welfare and Institutions Code section 10554.

*Dissenting opinion, page 3, footnote 2.

832.) In view of the longstanding practice of the department, acquiesced in by the Legislature, this court should be hesitant to interfere with the policies of the other branches of government.

The California Constitution makes this court the final authority on matters of state law. (Cal.Const., art. IV, § 1.) Yet, as to matters of administrative policy, we should act circumspectly. In the words of the United States Supreme Court: "The Constitution may impose certain procedural safeguards upon systems of welfare administration. [Citation omitted.] But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." (Dandridge v. Williams (1970) 397 U.S. 471, 478.)

I cannot concur with the majority of this court who would preclude the Director of Welfare from utilizing common sense in providing an equitable distribution of California's limited welfare funds to needy recipients.

CLARK, J.

COPY

In the Supreme Court of the State of California
IN BANK

Filed Jul 19 1974

Sac. 7985
Super Ct. No. 219145

Laura Cooper et al.,
Plaintiffs and Appellants,
vs.
David B. Swoap, as Director, etc.,
Defendant and Respondent.

MODIFICATION OF DISSENTING OPINION

The dissenting opinion of Clark, J., is modified as follows:

On page 9, line 1, after the word "income" insert: ", plus the bonus value of food stamps,"

On page 11, line 9, strike the sentence "Also, section 1612(a)(2) of the Social Security Act not only provides in general that in-kind income be taken into consideration, but more specifically provides a formula for assigning a dollar value to the provision of support and maintenance received while living in another's household."

On page 12, footnote 10, line 2, strike the word "federal" and at the end of line 2, of the footnote, add after the word "in" the following: "the recent federalization of the adult aid program." In line 3, of the same footnote, delete the word "which," and capitalize the letter "S" in the word "Section," and add after "Section 1612(a)(2) of the Social Security Act" the following: "(42 U.S.C. § 1382 (a)(2))"

CLARK, J.

Appendix B

§ 11450. Table of amount of aid: Increases or decreases commensurate with federal contributions: Payment for children receiving "foster care": Special needs allowances

(a) For each needy family which includes one or more needy children qualified for aid under this chapter, except as provided in Section 11403, there shall be paid, notwithstanding minimum basic standards of adequate care established by the department under Section 11452, an amount of aid each month which when added to his income, exclusive of any amounts considered exempt as income or paid pursuant to subdivision (d) of this section or Section 11453.1, is equal to the sums specified in the following table, as adjusted for cost-of-living increases or decreases pursuant to Section 11453:

Number of eligible needy persons in the same home	Maximum aid
1	$117
2	192
3	237
4	282
5	322
6	362
7	397
8	432
9	467
10 or more	502

If, when and during such times as the United States government increases or decreases its contributions in assistance of needy children in this state above or below the amount paid on July 1, 1972, the amounts specified in the above table shall be increased or decreased by an amount equal

to such increase or decrease by the United States government, provided that no such increase or decrease shall be subject to subsequent adjustment pursuant to Section 11453.

(b) For children receiving foster care who are qualified for aid under the provisions of this chapter, except as provided in Section 11403, there shall be paid the sum necessary for the adequate care of each child, but not to exceed in any month the product of eighty dollars ($80) multiplied by the number of children in each county receiving foster care. The state shall pay 67.5 percent and the county shall pay 32.5 percent of the aid furnished for the adequate care of such children.

The maximum amount of aid payable under the previous paragraph shall be increased up to one hundred dollars ($100) per month in assistance in those cases and during such times as the United States government contributes.

(c) As used in this chapter, "foster care" means care in a boarding home or institution.

(d) (1) In addition to the amounts payable under subdivision (a) of this section and Section 11453.1, a family shall be entitled to receive an allowance for recurring special needs not common to a majority of recipients. The county shall pay the full cost of the additional aid furnished needy families pursuant to this subdivision after first deducting therefrom any funds received from the federal government. Such recurring special needs shall include but not be limited to special diets upon the recommendation of a physician, and unusual costs of transportation, laundry, housekeeping service, telephone, and utilities not to exceed the minimum basic standards of adequate care.

(2) A family shall also be entitled to receive an allowance, at county expense after first deducting there-

from any funds received from the federal government, for nonrecurring special needs caused by sudden and unusual circumstances beyond the control of the needy family; provided, however, that such needs shall not be taken into consideration in determining the eligibility of the family for aid.

(3) The department shall establish rules and regulations assuring the uniform application statewide of the provisions of this subdivision.

(e) Except for the purposes of Section 15200, the amounts payable to recipients pursuant to Section 11453.1 shall not constitute part of the payment schedule set forth in subdivision (a) of this section.

The amounts payable to recipients pursuant to Section 11453.1 shall not constitute income to recipients of aid under this section.

Added by Calif. Stats 1972 ch. 1406 § 31.7, effective December 26, 1972, operative June 1, 1973.

Appendix C

44-115 AB ATD OAS AFDC

.8 *One or More Recipients of AFDC Resides in the Same Household with One or More Recipients of Adult Aids*

.81 When the above situation exists, if the recipient's (Adult Aid or FBU) housing and utilities allowance exceeds his share of the actual cost of housing and utilities (including telephone), the excess shall be considered in-kind income and taken into consideration in computing the grant.

.82 Each recipient's share shall be calculated by dividing the total actual cost of housing and utilities (including telephone), by the number of persons (adults and minors, needy and nonneedy) residing in the household.

COURT, U. S

FILED
OCT 23 1974
MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1974

EARL W. BRIAN, M.D. etc., et al., *Petitioners,* vs. CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al., *Respondents.*	NO. 74-269
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. LAURA COOPER, et al., *Respondents.*	NO. 74-311
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. WILLIAM WAITS, et al., *Respondents.*	NO. 74-312

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Reasons Why the Writs Should be Denied	2
I. Petitioners' "Noncash Economic Benefit" Policy Is Completely at Variance With This Court's Concept of an AFDC Flat Grant	2
A. In 1971, California Converted From an Individualized AFDC Payment System to a Flat Grant	3
B. After the California Legislature Adopted a Comprehensive Flat Grant System, Petitioners Adopted Policies Reducing Grants to Certain Families Who Shared Housing With Other Persons Contending That Such Families Had Lower Needs. Such a Policy Violates the Fundamental Logical and Mathematical Premise of a Flat Grant	7
1. The "Flat Grant" in Swoap v. Cooper	7
2. The "Flat Grant" in Brian v. California Welfare Rights Organization	11
3. The "Flat Grant" in Swoap v. Waits	14
C. Petitioners' Contention That the "Noncash Economic Benefits" Measured by Their Regulations Constitute "Income" Within the Meaning of Section 402(a)(7) of the Social Security Act Is Wholly Unsupported by the Statute, Its Legislative History, Or the Thirty-Five Years of Administrative Practice Under the Statute	16
II. Other Issues Not Common to the Three Cases	20

A. Even If the "Noncash Economic Benefits" of Shared Housing Could Properly be Considered "Income", the Regulation Which Measures Its Value Is Invalid Since It Does Not Measure the Actual Value; Instead It Assigns a Fictional, Standardized Value That Violates Federal Law 21

B. Although Not Passed Upon by the Court Below in Swoap v. Cooper, The Regulation at Issue Also Violates 42 U.S.C. § 602(a)(24) and the Equal Protection Clause of the United States Constitution 22

C. The Regulation at Issue in Swoap v. Waits Conclusively Presumes That Non-Needy Caretaker Relatives Are Willing and Able to, and Do, Provide Free Housing and Utilities to the AFDC Children Residing With Them. It Therefore Violates HEW's "Actually Available Income" Rule as Well a the Due Process Clause of the Fourteenth Amendment 23

III. There Is no Compelling Reason Why This Court Should Preempt the U.S. Department of Health, Education, and Welfare from Making an Initial Determination Whether or Not California Law, as Interpreted by the Court Below, Violates Supervening Federal Law 24

Conclusion 26

TABLE OF AUTHORITIES CITED

Cases	Pages
Alcala v. Burns, U.S. Sup. Ct., O.T. 1973, No. 73-1708	11
Arizona Dept. of Public Welfare v. United States Dept. of H.E.W. (9th Cir. 1971) 449 F.2d 456, *cert. den.* 405 U.S. 919 (1972)	25
Baron v. Bellairs (5th Cir. June 28, 1974) ..... F.2d ....., No. 74-1210	21
Bradley v. School Bd. of Richmond (1974) ..... U.S. ....., 94 Sup. Ct. 2006	22
California Welfare Rights Organization v. Carleson (1971) 4 Cal.3d 445	5, 25
Carver v. Hooker, U.S. Sup. Ct., O.T. 1974, No. 74-242	11
Cramp v. Board of Public Instruction (1961) 368 U.S. 278	17
Doe v. Lukhard, U.S. Sup. Ct., O.T. 1973, No. 73-1763	11
Hall v. Villa (1972) 406 U.S. 965	6
Heiner v. Donnan (1932) 285 U.S. 312	24
Henry v. Mississippi (1965) 379 U.S. 443	17
Johnson v. White (D. Conn. 1972) 353 F. Supp. 69	9
King v. Smith (1968) 392 U.S. 309	23
Lewis v. Martin (1970) 397 U.S. 552	23
McGowan v. Maryland (1961) 366 U.S. 420	23
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New Jersey Welfare Rights Organization v. Cahill (3rd Cir. 1973) 483 F.2d 723	9

Pages

Rosado v. Wyman (E.D.N.Y. 1969) 304 F. Supp. 1356 ..... 2, 4
Rosado v. Wyman (2d Cir. 1969) 414 F.2d 170 ..... 3, 4
Rosado v. Wyman (1970) 397 U.S. 397 ....2, 3, 4, 6, 7, 9, 25, 26
Rosado v. Wyman (E.D.N.Y. 1970) 322 F.Supp. 1172 7
Roselli v. Affleck (D.R.I. 1974) 373 F.Supp. 36 9

Shea v. Vialpando (1974) ..... U.S. ....., 94 Sup. Ct. 2006 .....18, 21

United States Dept. of Agriculture v. Moreno (1973) 413 U.S. 528 23

Villa v. Hall (1972) 7 Cal.3d 926 6
Vlandis v. Kline (1973) 412 U.S. 441 24

CONSTITUTIONS

California
Article 5, § 7 24
Article 5, § 21 24
Article 6, § 10 12

United States
Fourteenth Amendment 15, 22

STATUTES

Federal
Title 42 United States Code
§§ 301-306 8
§ 602(a)(7) 17
§ 602(a)(24) 22
§ 604 25

Pages

§ 606(a) 14
§ 1201-06 8
§ 1316(3) 25
§ 1316(5) 25
§ 1351-55 8
§ 1381-83c 8
§ 1382a(a)(2)(A) 18

Public Law 92-603 ..... 8, 19

Social Security Act
§ 402(a)(7) 16, 17, 21, 25
§ 406(a) 14
§ 1612(a)(2)(A) 18

Act of August 10, 1939 17

California
Welfare and Institutions Code
§ 11003 25
§ 11450 6
§ 11450(a) 6
§ 11452 6

Welfare Reform Act of 1971 5

REGULATIONS

California Dept. of Benefit Payments, Eligibility and Assistance Standards
§ 44-115.6 ..... 16, 23, 24
§ 44-115.611 15
§ 44-115.8 ..... 7, 22

Pages

§ 44-115.9 ..... 7, 8, 11, 12, 13, 15, 21
§ 44-115.95 13

Federal
20 C.F.R. § 416.1125(a) 19

26 C.F.R. § 1.61(d) 19

45 C.F.R.
§ 213 25
§ 233.20(a)(3)(ii)(*c*) 21, 23
§ 233.90(a) 23

39 Fed. Reg. 3674 (Jan. 24, 1974) 19

Social Security Administration Claims Manual
§ 12237(b) 19

United States Supreme Court Rules, Rule 23(5) 1

MISCELLANEOUS

Gladys O. White, "Simplified Methods For Determining Needs," U.S. Dept. of H.E.W. (1964) 2

In the Supreme Court of the United States

OCTOBER TERM, 1974

EARL W. BRIAN, M.D. etc., et al., *Petitioners,* vs. CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al., *Respondents.*	NO. 74-269
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. LAURA COOPER, et al., *Respondents.*	NO. 74-311
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. WILLIAM WAITS, et al., *Respondents.*	NO. 74-312

Respondents' Consolidated Brief in Opposition to Petitions for Certiorari

PRELIMINARY STATEMENT

The principal issue in these three cases is common to and determinative of each case. Therefore, we have chosen to submit a consolidated Brief In Opposition pursuant to Rule 23(5). Respondents in all three cases have common counsel. Respondents hope that this procedure will not only enhance the Court's understanding of the issues, but will also conserve its time.

Initially, respondents discuss the common issues in Point I. Then in Point II we discuss those issues that are peculiar to one or two (but not all) of the cases. Finally, we discuss Petitioners' basic claim that the construction of state law by the Court below in each of the three cases renders the state AFDC plan out of conformity with federal law. We suggest that there is no present need for the Court to address itself to these issues and that the Court should await a determination of nonconformity by the agency principally responsible for such determinations, the U.S. Department of Health, Education and Welfare.

REASONS WHY THE WRITS SHOULD BE DENIED

I. Petitioners' "Noncash Economic Benefit" Policy Is Completely at Variance with This Court's Concept of the AFDC Flat Grant.

In the mid-1960's, HEW began encouraging the states to simplify their AFDC standards of need.[1] Until this time standards of need were computed on a highly individualized basis attempting to recognize the peculiar circumstances of each family. One result was that the need standards were exceptionally complicated and difficult to use, even for experienced caseworkers. In one sense, these individualized need standards expressed a preference for individual equity over administrative efficiency. These highly individualized systems were also criticized as placing too much discretion, and therefore, power subject to abuse, in low-level welfare workers. This tended to degrade recipients because it made them particularly vulnerable to behavior control tendencies in some social workers. *Rosado v. Wyman* (E.D.N.Y. 1969)

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1. The "standard of need" is "a yardstick for measuring who is eligible," *Rosado v. Wyman* (1970) 397 U.S. 397, 408. *See* Gladys O. White, "Simplified Methods For Determining Needs," U.S. Dept. of HEW (1964).

304 F. Supp. 1356, 1369, *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

Simplification, therefore, was viewed as a means for enhancing individual dignity, *ibid*, and "as an advance in administrative efficiency." *Rosado v. Wyman* (1970) 397 U.S. 397, 417; *see further, id.*, 416-17; *id.*, O.T. 1969, No. 540, Memorandum For The United States As Amicus Curiae, 10-11. The most extreme form of simplification is one in which all the diverse elements of an individualized system are consolidated by a statistically weighted averaging. The result is a single sum applicable to all families of a given size. This is called a "flat grant maximum" system. *Rosado v. Wyman, supra*, 397 U.S. at 417.

These cases present the principal question of whether a state, after averaging the needs of all recipients under an individualized system—high need, low need and all in between—*must thereafter* continue to treat low-need families on an individualized basis. A highly simplified example will put this question in its proper perspective.

Assume that a hypothetical state had three AFDC families with four recipients in each family. Under its individualized needs system, family A's monthly needs were determined to be $200, family B's, $250, and family C's, $300. If the state converted to a flat grant system, the flat grant would be $250. Must the state then pay B and C $250 but pay A only $200 since A's needs are still only $200? That is what petitioners contend in the three instant cases.

A. IN 1971, CALIFORNIA CONVERTED FROM AN INDIVIDUALIZED AFDC PAYMENT SYSTEM TO A FLAT GRANT.[2]

To fully understand the respective contentions of the parties, a brief review of the California AFDC payment struc-

2. The most extensive exposition of the statutory background by the Court below is in *Swoap v. Cooper*, Pet., App., 5-13.

ture is necessary. Prior to 1971, families of equal size received greater or lesser grants depending upon several variable factors: (1) the age of each child; (2) the sex of each child; (3) the county of residence; (4) the number of adults (one or two) in each family; (5) the *actual* expenditures for rent (however, *actual* expenditures were recognized only up to specified maximums which varied according to the size of the family and further varied according to the county of residence); and (6) whether or not a child was unborn or in being. These factors, and the amounts applicable to each, had long been established by administrative regulations of the Director of the state welfare agency.

When a family applied for AFDC (and every month after a family was determined eligible), the pertinent factual circumstances of *each* family would be determined in order to apply each of the foregoing factors. When this review was completed, the result was called the family's "need". This system resulted in considerable variation.[3] For example, an AFDC mother residing Sacramento County with her three daughters, all of whom were under six years of age, would have total monthly needs (exclusive of housing) of $183.30. On the other hand, a mother living with three teenage sons in Sierra County would have a similar monthly needs figure of $305.05. Assuming that both paid rent equal to the applicable maximums for four-person housing in their counties ($120 and $110, respectively) total needs would be $303.30 and $415.05.

After the "needs" computation was completed, the family's income would be computed and the total subtracted

3. *Cf., Rosado v. Wyman* (E.D.N.Y. 1969) 304 F.Supp. 1356, 1365-67, *rev'd on other grounds*, 414 F.2d 170 (2d Cir. 1969), *rev'd* 397 U.S. 397 (1970).

from total "need." The difference, called "unmet need", would then be paid as an aid grant.[4] Thus, there was wide variation in aid grants to families of equal size. If each of the four-person families in the foregoing example had a monthly income of $200, the Sacramento County family would receive a grant of $103.30 while the Sierra County family would receive $215.05.

An important aspect of this system was that any attempt to reduce housing expenditures, and to reallocate the resulting savings to other needs such as food or clothing, would be futile. The move to cheaper housing would be met with a *pro tanto* decrease in grant. In each of the foregoing examples, a $25 monthly reduction in rent would reduce the grant by a full $25 (to $78.30 and $90.05, respectively).

In August, 1971, the California Legislature enacted the Welfare Reform Act of 1971. Among its many provisions, the Act "replaced this cumbersome system," *Swoap v. Cooper,* Pet., App., 5, with a flat grant system by completely rewriting the grant payment statutes, Welf. & Inst. Code §§ 11450(a) and 11452.[5] "The chief purposes . . . were to streamline the administration of the welfare program and to eliminate welfare paternalism by allowing recipients to allocate grant money according to their own priorities." *Id.,* App., 6.

> "The Legislature abolished the administrative allowances and need figures and took upon itself the tasks

4. In certain cases of high "needs" and little or no income, "unmet need" might exceed statutorily imposed maxima which varied only according to family size. In such case, "unmet need" would be paid only up to the statutory maximum.

5. The former versions are set out in *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 449, nn. 6, 8. The present grant statute, § 11450, is set out in *Swoap v. Cooper,* Pet., App., 45-47. The present needs statute, § 11452, is set out in Exhibit "1" hereto.

> of determining the minimum need level of recipients (Welf. & Inst. Code § 11452). The Legislature itself then set *uniform welfare payments* (Welf. & Inst. Code § 11450) *based on a fair averaging of all AFDC grants,* a method of welfare benefit computation recently approved by the United States Supreme Court in Rosado v. Wyman (1970) 397 U.S. 397." *Id.,* 5-6 (emphasis in original).

Unlike its predecessor, the new § 11450 no longer looked to the "needs" of any particular family in computing a grant.[6] The process became far, far simpler: the grant to *any* and *every* family would be the difference between available income and a statutorily fixed amount based *solely* on the number of eligible, needy persons in the household. The touchstone is that *all families of equal size are to be treated equally.*

The method by which the new amounts in §§ 11450(a) and 11452 were derived was simple arithmetic averaging of the varying amounts received by families of equal size under the prior method. *Swoap v. Cooper,* Pet., App., 11. True, payment of the same amounts to all families of equal size may mean that some are able to cope more easily than others. (Consider an AFDC mother with three infant children compared to another with three teenagers.) But this is simply the result of averaging. As this Court has ob-

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6. The "needs standard" statute, § 11452, uses the term, "minimum basic standards of adequate care" for "needs." The amounts applicable to families of specified size are set forth in the statute. These amounts are relevant only to *initial* eligibility. See *Rosado v. Wyman* (1970) 397 U.S. 397, 408; *Villa v. Hall* (1972) 7 Cal.3d 926, 928, *on remand from Hall v. Villa* (1972) 406 U.S. 965.

The "grant" statute, § 11450(a), specifies that "there shall be paid, notwithstanding minimum basic standards of adequate care . . . an amount of aid each month which when added to . . . income . . . is equal to the sums specified in the following table. . . ." (Emphasis added.)

served, "obviously, such averaging may affect some families adversely and benefit others." *Rosado v. Wyman, supra,* 397 U.S. at 419. Thus, as in every averaging, all those families that were receiving *more* than the average under the old system *lost* benefits while those formerly receiving *less* than the average gained thereby. *See further, Rosado v. Wyman, on remand,* (E.D. N.Y. 1970) 322 F.Supp. 1172, 1189.

B. AFTER THE CALIFORNIA LEGISLATURE ADOPTED A COMPREHENSIVE FLAT GRANT SYSTEM, PETITIONERS ADOPTED POLICIES REDUCING GRANTS TO CERTAIN FAMILIES WHO SHARED HOUSING WITH OTHER PERSONS CONTENDING THAT SUCH FAMILIES HAD LOWER NEEDS. SUCH A POLICY VIOLATES THE FUNDAMENTAL LOGICAL AND MATHEMATICAL PREMISE OF A FLAT GRANT.

Three classes of "gainers" in the aweraging process are those represented by the respondents in each of the three Petitions before the Court. After the Welfare Reform Act of 1971 became effective, petitioner SWOAP's predecessor issued a series of regulations which reduced the grants otherwise payable to these several categories of "gainers."

First, a regulation, EAS § 44-115.9, was adopted establishing "allowances" for rent, utilities, food and clothing which varied according to family size. (See *Brian v. CWRO,* Pet., App., 34-35 where the regulatiom is set out in full.) Then, three other regulations, those here at issue, were adopted which established three slightly varying schemes to utilize this basic regulation to bring about grant reductions.

1. The "Flat Grant" in Swoap v. Cooper.

The principal case of this trilogy, *Swoap v. Cooper,* involves EAS § 44-115.8. It applies when any AFDC "child resides with an adult aid recipient. . . ." *Id.,* Pet. 3. An "adult aid" recipient is defined as recipient of the benefits

of the three "adult" public assistance programs under the Social Security Act of 1935.[7] For example, an AFDC mother and her two children may share housing with the children's elderly grandmother. Assume that in such a case the total rent and utility costs were $100. The regulation then requires that the *pro rata* share of the *actual* housing and utilities costs of the AFDC unit, $75, be compared to the EAS § 44-115.9 "allowance." For an AFDC family of three, the "allowance" is $104. *Brian v. CWRO,* Pet., App., 34. Thus, the "allowance" exceeds the *pro rata* share by $29. "[I]f the allowance exceeds the [*pro rata*] share of the *actual* cost of housing and utilities (including telephone), then the excess shall be countable against the . . . maximum aid payment *as income.*" *Swoap v. Cooper,* Pet., 3-4 (emphasis added). In this example, the amount of "income" is $29. Thus, assuming no "real" income, the otherwise payable grant of $235 would be reduced to $206.

The asserted rationale for this policy is that these families do not "need" as much as families who are not sharing housing and utilities with an "adult aid" recipient. The amounts that the latter families "need" is set forth by regulation in EAS § 44-115.9; those amounts represent the average *actual* expenditures of those families for housing and utilities.[8]

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7. Old Age Assistance (OAA), title I, 42 U.S.C. §§ 301-06, Aid to the Blind (AB), title X, 42 U.S.C. § 1201-06 and Aid to the Totally and Permanently Disabled (ATPD), title XIV, 42 U.S.C. §§ 1351-55; each of these programs has been succeeded by the new combined federally administered income maintenance program for the aged, blind and disabled, the Supplemental Security Income (SSI) program, P.L. 92-603, §§ 301-03, 86 Stat. 1465-78, 42 U.S.C. §§ 1381-83c.

8. The factual derivation of EAS § 44-115.9 is discussed in *Swoap v. Cooper,* Pet., App., 24, n.2 (Burke, J., dissenting).

The basic flaw with such an approach is that it attempts to preserve the cake while at the same time strives to consume it. In short, it exacts a double penalty. An average, by definition, reflects the individualized needs of "high need" and "low need" families. Thus, after an averaging, "high need" families are penalized since they received a higher grant before the implementation of a flat grant system.

Curiously, all of the litigation over the conversion to flat grants by several states following this Court's *Rosado* decision involved challenges by "losers" in the averaging process complaining of the inclusion of "gainers" in the striking of the average. Generally, these litigants objected to the inclusion of families whose rental needs had been determined (as in California) on an "as-paid" basis and: (1) who lived in public housing and who therefore paid artificially low rents, *New Jersey Welfare Rights Organization v. Cahill* (D.N.J., 1972) 349 F.Supp. 501, 511, *aff'd*, 483 F.2d 723, 727 (3rd Cir. 1973), *Roselli v. Affleck* (D.R.I. 1974) 373 F.Supp. 36, 44-45; (2) who paid no rent at all, *Johnson v. White* (D.Conn. 1972) 353 F.Supp., 69, 78; (3) who lived in rural areas and paid lower rents in comparison to urban areas, *New Jersey Welfare Rights Organization v. Cahill, supra*, 349 F.Supp. at 511; or, (4) who shared lodging with other non-AFDC persons, *id.*, 75, 77-78, *Roselli v. Affleck, supra*, 373 F.Supp. at 46-47. In each case, the courts held that there was nothing legally improper in such a method because such a result was inherent in the nature of the statistical process. As the Third Circuit said in *New Jersey Welfare Rights Organization v. Cahill, supra*, 483 F.2d at 727:

> "The thrust of these arguments is that any averaging process is 'unfair' to many welfare recipients. While

> it is conceded that the result of averaging may reduce welfare payments to many families and increase the grants to others, [42 U.S.C.] § 602(a)(23), as interpreted by *Rosado* [397 U.S. 397] does not proscribe such a result."

Now, however, petitioners seek to enforce a double penalty by recognizing only the reduced needs of "lower need" families which have already been recognized in the establishment of the average. The Court below concluded that the imposition of this double penalty was inconsistent with the intent of the California Legislature in establishing a flat grant system:

> "In calculating the various flat grant figures included in the schedule of section 11450, the Legislature averaged the diverse needs of *all* AFDC recipients; this averaging took into account the savings accruing to some recipients because of shared housing, as well as the many factors, such as specialized housing or utility needs, which resulted in higher housing costs for other recipients." *Swoap v. Cooper,* Pet., App., 11 (emphasis in original).

Of course, there is nothing that requires a state which adopts a "flat grant" approach to include *all* needs in the averaging process or to include all variations of a particular need. For example, all needs could be averaged *except* housing, which could continue to be allowed "as paid". This would result in lower grants to those who share housing.[9] Or, the housing needs of only those families which had been living in independent living arrangements could be averaged; those in shared housing arrangements could continue to be treated individually. Petitioners contended below that this is what was done in California. However, based upon exhaustive analysis of the legislative history, the Court

9. Or for those who live in public housing, or who live in rural areas, or who have free housing.

below concluded that "there is absolutely nothing to support such a contention." *Swoap v. Cooper,* Pet., App. 11, n. 13; *see also, id.,* 8-10. The Court below therefore held that "[b]ecause the effects of shared housing have already been considered in establishing the basic grant figures . . . the challenged regulations [EAS § 44-115.8] . . . would impose an unfair 'double deduction' on AFDC recipients who happen to share a household with a recipient of adult aid." *Id.,* 11-12.

2. The "Flat Grant" In Brian v. California Welfare Rights Organization.

The circumstances of the second case in the trilogy, *Brian v. CWRO,* also involved another category of "gainers" in the averaging process, families with unborn children. Since 1949, California has defined the term, "needy child", to include an unborn child; there is no disagreement between the parties on this score.[10]

Prior to the 1971 conversion to a flat grant, the existence of an unborn child increased the family's "needs" by only a flat $21 per month. *Brian v. CWRO,* Pet., App., 4. This amount was less than would be the result if the child was in being because all of the other variable need factors (age, sex, county of residence, etc.) were inapplicable to this special situation. Therefore, after the averaging process leading to the flat grant, this class of families would tend to be "gainers". Upon conversion to the flat grant, the unborn child was treated for grant computations as equivalent to a child in being. Thus, prior to her pregnancy, respondent SHELTON, her husband and their young son, Christopher, consisted of a three person family eligible for a

10. Thus, this case does *not* present the Court with the question of whether or not 42 U.S.C. § 606(a) requires inclusion of unborn children. *Cf. Alcala v. Burns,* U.S. Sup. Ct., O.T. 1973, No. 73-1708; *Doe v. Lukhard,* U.S. Sup.Ct., O.T., 1973, No. 73-1763; *Carver v. Hooker,* U.S. Sup.Ct., O.T. 1974, No. 74-242.

three-person family grant of $235 monthly. In early April, 1972, respondent SHELTON became pregnant; her family thereafter consisted of four persons eligible for the full four-person $280 grant as if the child she was carrying was in being.

Later in May, 1972, petitioner SWOAP's predecessor implemented a policy whereby an unborn child was considered to be receiving free rent and utilities owing to its residency within its mother's womb. The full "in-kind income allowances" of EAS § 44-115.9 for these items of need for one person were computed. The total was $67.[11] This was subtracted from the four-person grant of $280 thus leaving the family with just $213, $22 *less* than the $235 the family received *before* respondent SHELTON became pregnant. In July, 1972, the policy was changed so that the "in-kind income" would equal the increment to the next higher-person grant level; in the case of the SHELTON family, that increment is $45 ($280-235). In effect, the unborn child would no longer be recognized as eligible for a grant although this result would be reached after traveling an unusual, albeit imaginative, route.

On August 10, 1972, this action was commenced as an original mandamus proceeding in the California Court of Appeal seeking that Court's discretionary assumption of jurisdiction pursuant to Art. VI, § 10 of the California Constitution. One argument asserted was that both state and federal law required inclusion of an unborn child in the family grant (the federal law arguments were similar to the arguments made by the recipients in the cases cited in n. 10 *supra*) and that the "in-kind income" notion completely thwarted the policies inherent in such requirements. Secondly, it was asserted that the "in-kind income" notion

11. This total is less than the amounts in the version of EAS § 44-115.9 set forth in *Brian v. CWRO*, Pet., App., 34, since the amounts have been updated since May, 1972.

was fundamentally at odds with the principle of a flat grant since the lower need families with unborn children under the pre-1971 scheme were in fact included in the averaging process. Six days after the action was filed, a regulation, EAS § 44-115.95, was adopted which again changed the details of computing the precise amount of "in-kind income". (It is set forth in *Brian v. CWRO,* Pet., App., 32.) Henceforth, it was determined by the incremental values expressed in the "allowances" regulation, EAS § 44-115.9, of a family equal in size to the members in being compared to a family with one or more person. (See *Brian v. CWRO,* Pet. App. 13, for an actual application of the new process in operation using the circumstances of the SHELTONs.) Because of the mathematical relation of the values in EAS § 44-115.9, the amount of the "in-kind income" in all cases would be such that a family would have a $10 grant increase whenever an AFDC mother became pregnant.

Respondents contended that this practice was completely at variance with the fundamental mathematical premise of a flat grant: some gain and some lose but all families of equal size whose individual circumstances were taken into consideration in striking the average are to receive the same grant amount. Petitioners replied with the contention that the economic benefit of the prenatal lodgings constituted "income" or "resources" which, pursuant to state and federal law *must* be subtracted from the maximum grant. Without directly addressing respondents' arguments on the nature of a flat grant, the Court below rejected petitioners' "income" or "resources" contentions as wholly unsupported by state or federal law. *Brian v. CWRO,* Pet., App., 7-8.[12]

12. The Court in its subsequent opinion in *Cooper,* which does treat the flat grant issues, recognized the flat grant issue as common to *Brian v. CWRO, Swoap v. Cooper,* Pet., App., 1, n.1. *See also, id.,* 16, n.16.

3. The "Flat Grant" in Swoap v. Waits.

Similarly, the *Waits* class of children is another group of "gainers" in the averaging process; they are children who have been orphaned or abandoned and who are not living with their parents, but are living with "non-needy caretaker relatives."

To be a "caretaker relative," one must be a person related to the child to the degree specified in § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), such as a grandmother, aunt, brother, etc. To be "non-needy" the income and resources of such relatives must be in excess of the increment in the income limit applicable to a family equal in size to the children in question *plus* the non-needy caretaker relatives. For example, respondent BROWN and his wife are the caretaker relatives of their two minor nieces and nephew. The income limit applicable to the three children is $235 per month. If the BROWNs are added, the family becomes a five-person family with a grant of $331. Hence, if the BROWNs' own income exceeds $96 per month ($331 —235), they are considered to be "non-needy" and therefore are not eligible for a grant.

Prior to the 1971 conversion to the flat grant, children living with non-needy caretaker relatives had their housing needs computed on the same basis as children living with recipients of "adult aids," i.e., the *Cooper* class. That is, their housing needs were equal to their *pro rata* share of the household's total shelter costs, limited only by the maximum allowances applicable to a family of equal size. *Swoap v. Waits,* Pet., App., 5, n. 5.

For example, if four needy dependent children were living with their non-needy aunt and uncle in Sacramento County, and the total household shelter costs were $150, the children's *pro rata* share would be $100 (two-thirds of $150). This full amount would be allowed as shelter need since it would be below the limit for a four-person family.

The average needs of the class would tend to be less than those applicable to families of equivalent size living independently since the latter do not enjoy the "economies of scale" which exist when housing is shared. Thus, this class of children would tend to be "gainers" in the averaging process.

Upon conversion to the flat grant in 1971, the newly adopted regulation challenged herein, EAS § 44-115.611 (set out in *Swoap v. Waits,* Pet., App., 26), brought about substantial grant reductions to the *Waits* class of children. The reasoning underlying this regulation is as follows:

1. These children are "less needy" than other children because they receive free rent and utilities from their non-needy caretaker relatives;

2. The rent and utilities they receive are free because, as the Court below held, the regulation *"conclusively presumes* that such relatives, by agreeing to take such children into their homes, are both willing and able to provide the children with free housing and utilities." *Id.,* at 6 (emphasis in original).[13]

3. Accordingly, the full value of the housing and utility "allowances" of EAS § 44-115.9 is to be subtracted from the applicable grant maximums.[14]

This brought about substantial grant reductions. For example, respondent LUCEY's grandchild's monthly grant was reduced from $115 to $48; the three children living with

13. The conclusive nature of this presumption is treated separately below. Basically, respondents contend that it violates both a federal regulation as well as the Due Process Clause of the Fourteenth Amendment.

14. The effect was mitigated slightly if, and to the extent that, the presence of the children caused increases in the cost of housing and utilities. For example, if larger quarters had to be obtained or if the children used more water than otherwise.

respondent BROWN had their $235 grant reduced to $140; and, respondent WAIT's three grandchildren and three great-grandchildren had their $360 grant reduced to $259.

The Court below held that EAS § 44-115.6, which brought this all about, was:

> "simply another variation on the department's 'non-cash economic benefit' theme, a theme which, as explained in *Cooper*, is fundamentally incompatible with the 'flat grant' system of welfare benefits adopted by the Legislature in 1971. Thus, although the instant regulation seeks to reduce welfare payments on the basis of reduced housing and utility needs of recipients living with non-needy relatives, such reduced needs, if they in fact exist, have already been taken into account by the Legislature in computing the flat grant figures of section 11450. Consequently, if approved, the challenged regulation would in reality effect an improper 'double deduction' of welfare benefits for those recipients who happen to live with non-needy relatives." *Id.*, at 5.

C. PETITIONERS' CONTENTION THAT THE "NONCASH ECONOMIC BENEFITS" MEASURED BY THEIR REGULATIONS CONSTITUTE "INCOME" WITHIN THE MEANING OF SECTION 402(a)(7) OF THE SOCIAL SECURITY ACT IS WHOLLY UNSUPPORTED BY THE STATUTE, ITS LEGISLATIVE HISTORY OR THE THIRTY-FIVE YEARS OF ADMINISTRATIVE PRACTICE UNDER THE STATUTE.

In each of the three cases, petitioners had one basic response to the argument that individualized treatment of classes of "gainers", after conversion to a flat grant, violated the fundamental logical and mathematical premise of such a grant system. Petitioners said that notwithstanding the California Legislature's intention that these classes of recipients receive *full* grants, the supervening will of Congress embodied in § 402(a)(7) of the Social Security

Act, 42 U.S.C. § 602(a)(7),[15] rendered the State Legislature's will nugatory.[16]

Petitioners place primary reliance upon the § 402(a)(7) phrase "income and resources". Great emphasis is placed upon the contention that *all* "income and resources" must be considered. This point we readily concede; that is not the question. The question is whether these "noncash economic benefits" were intended by Congress to be "income and resources" in 1939 when the statute was enacted. *See* Act of Aug. 10, 1939, c. 666, § 401, 53 Stat. 1379. There is a very good reason why petitioners have not cited to this Court (or to any of the courts below) pertinent legislative history, HEW regulations (or other agency policy statements), case authority or another state's practice. The reason is that none of these exist. Petitioners argue, *ex cathedra,* that these "noncash economic benefits" are "income" or "resources" (always using the terms interchangeably) when the four-decade history of the public assistance titles of the Social Security Act demonstrates only that these notions have *always* been treated, if treated at all, as aspects of a "need" determination, not as an "income" or "resource" concept.

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15. The section provides that:
"(a) A state [AFDC] plan . . . must: . . .
"(7) . . . provide that the state agency shall, in determining need, take into consideration any other income and resources of a child claiming [AFDC] . . . in determining the need of the child . . . claiming such aid. . . ."

16. Petitioners also made an alternative argument that these "noncash economic benefits" were income as a matter of *state* law. In each case, the arguments were rejected. *Swoap v. Cooper,* Pet., App., 13-17; *Swoap v. Waits,* Pet., App., 6; *Brian v. CWRO,* Pet., App. 7-8. Obviously, these interpretations of state law are not at issue before this Court. *Cramp v. Board Public Instruction* (1961) 368 U.S. 278, 281; *Henry v. Mississippi* (1965) 379 U.S. 443, 446-47.

As noted above, the touchstone of a flat grant system is that a family's grant is computed without regard to that family's *individual* needs. Since the California Legislature had withdrawn the power from petitioners to adopt regulations establishing needs, lower needs can no longer form the rationale for a lower grant. In order to circumvent this barrier, "needs" concepts were transmuted by petitioners into the concepts of "income" or "resources" by mere regulatory fiat. The Court below said in response:

> "The department's desire to cut welfare expenses at any cost has led it to disregard the clear guidelines of its legislative mandate and to construct a contrived and tortued concept of 'income' in an attempt to camouflage an impermissible administrative reevaluation of AFDC recipients' needs. An analysis of the complexities of the department's novel determination of 'income' is reminiscent of a journey into the fictional realms visited by Alice through the looking glass. In the fanciful world of Lewis Carroll, the inhabitants could turn fact into fiction and fiction into fact by mere ipse dixit. As Humpty Dumpty scornfully informed Alice, 'When I use a word, it means just what I choose it to mean—neither more nor less.' " *Swoap v. Cooper*, Pet., App., 21.

Petitioners' sole argument[17] in support of their contention that these "noncash economic benefits" are "income and resources" rests upon an analogy to § 1612(a)(2)(A) of the Social Security Act, 42 U.S.C. § 1382a(a)(2)(A).[18] That

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17. In each of their petitions, petitioners also quote out of context two sentences from this Court's recent opinion in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup. Ct. 1746, 1754. These two sentences merely state what respondents have repeatedly conceded: income must be determined *individually* and *all* income must be considered. The Court in *Shea* was not assaying the question of what is or is not income. That is the question that these cases raise.

18. In each of their Petitions, this statute is erroneously cited as 42 U.S.C. § 1382(a)(2)(A).

statute, first enacted on October 30, 1972, Public Law 92-603, § 301, 86 Stat. 1468, provides that an aged, blind or disabled recipient of Supplemental Security Income (SSI) benefits, who is "living in another person's household and *receiving* support and maintenance in-kind from such person" (emphasis added) shall be subject to a grant maximum which is one-third lower than otherwise "in lieu of including such support and maintenance in the unearned income of such individual. . . ." In other words, instead of making a determination of the actual cash value of "support and maintenance" (defined as "room and board," 20 C.F.R. § 416.1125(a), 38 Fed.Reg. 27406, Oct. 3, 1973; 39 Fed. Reg. 3674, January 24, 1974) in each case, a mechanical one-third grant reduction is made in all cases. But this rule applies only when an SSI recipient is *receiving* support and maintenance from another. It does *not* apply when an SSI recipient is *sharing* housing with another and enjoying the noncash economic benefits of economies of scale which exist when housing is shared. In that case, the recipient is *not* considered to be *receiving* anything from his or her roommate. Social Security Admin., CLAIMS MANUAL § 12237(b). It is that analogy which is most appropriate to the instant cases, an analogy wherein no "in-kind income" is considered to exist.

One important point should be made clear. Respondents have no quarrel with the notion of in-kind income. For example, a recipient who is given a TV set that has a market value of $200 receives in-kind income of $200 since the property can be converted to cash. Under the Internal Revenue Code, it is only when goods or services are received which have a fair market value that the value must be included as income. 26 C.F.R. § 1.61-2(d). An individual who saves on rent by sharing housing is not taxed on the

amount of the savings. The Court below pointed out this distinction as follows:

> "[U]nlike true 'in-kind income', the department's 'economic benefit' concept does not reflect *actual* income (commodities or cash) received by a recipient, but instead attributes 'constructive' income to a recipient who, through such economizing conduct as sharing housing, manages to spend less money monthly than the department's hypothesized average. A recipient who saves on housing costs by sharing a household with others, and who in the department's eyes thereby realizes 'noncash economic benefits,' is a far cry from a recipient who receives free housing (i.e., actual 'in-kind income income') or cash from a willing and able donor." *Swoap v. Cooper,* Pet., App., 20, n. 19 (emphasis in original).

In short, petitioners can point to absolutely nothing in federal or state law, other than the *ex cathedra ipse dixit* emanating from their regulatory pen, that *compels* California to evaluate the "noncash economic benefit" that flows from shared housing and to deduct the assigned value as income from AFDC grants.

II. Other Issues Not Common to the Three Cases.

In addition to those issues discussed above which are common to all three cases, the Court below passed upon several other issues which present federal questions. The analysis of these issues demonstrates that the rulings below do not bring California's AFDC plan into conflict with federal law but instead they bring it into conformity with that law.

These other issues only involve *Swoap v. Cooper* and *Swoap v. Waits.* First we will address an issue common to them both and then issues unique to each.

A. EVEN IF THE "NONCASH ECONOMIC BENEFITS" OF SHARED HOUSING COULD PROPERLY BE CONSIDERED "INCOME," THE REGULATION WHICH MEASURES ITS VALUE IS INVALID SINCE IT DOES NOT MEASURE THE ACTUAL VALUE; INSTEAD, IT ASSIGNS A FICTIONAL, STANDARDIZED VALUE THAT VIOLATES FEDERAL LAW.

Assuming that the "noncash economic benefit" of shared housing must be considered to be income under § 402(a)(7), EAS § 44-115.9 is invalid since it does not measure the *actual* value to the recipient in the individual case. Rather, it uses a standardized value applicable in all cases in complete disregard of the individual circumstances of each case. (It is based upon a 1970 survey; see *Swoap v. Cooper,* Pet., App., 24, n. 2.) HEW's regulations provide that "only such net income as is *actually available* for current use on a regular basis will be considered. . . ." 45 C.F.R. § 233.20(a)(3)(ii)(*c*) (emphasis added).

The Court below properly applied this rule and this Court's recognition in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup.Ct. 1746, 1753-54, that income must be individually determined, and held that:

> "No matter how accurately an allowance figure may reflect the *average* cost of housing and utilities for welfare recipients throughout the state, it is still an impermissible presumption as to the value of these items received by any one recipient. Only the *actual value* . . . could possibly constitute income to the recipient, and this the regulation does not measure." *Swoap v. Cooper,* Pet., App., 19 (emphasis in original); *see also, Swoap v. Waits,* Pet., App., 8-9.[19]

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19. *Cf., Barron v. Bellairs,* ..... F.2d ....., No. 74-1210 (5th Cir., June 28, 1974) which held invalid under the same rule a Georgia regulation requiring the averaging of the past six months' child support payment in lieu of the actual amount.

B. ALTHOUGH NOT PASSED UPON BY THE COURT BELOW IN SWOAP V. COOPER, THE REGULATION AT ISSUE ALSO VIOLATES 42 U.S.C. § 602(a)(24) AND THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

The *Cooper* regulation, EAS § 44-115.8, becomes operative only when an AFDC family is living with an SSI recipient.[20] A 1972 amendment to the AFDC title of the Social Security Act provides that:

> "if an individual is receiving benefits under subchapter XVI of this chapter [SSI], then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of benefits of the family under this subchapter [IV-A] and his income and resources shall not be counted as income and resources of a family under this subchapter." 42 U.S.C. § 602(a)(24), P.L. 92-603, § 414(a), 86 Stat. 1492.

On December 20, 1973, after the case was *sub judice* in the California Supreme Court, HEW interpreted 42 U.S.C. § 602(a)(24) to mean that "the need, income, resources and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home." (See Exhibit "2" attached hereto.) This provision, standing alone, clearly renders EAS § 44-115.8 invalid. Under this Court's longstanding *Schooner Peggy* doctrine, 42 U.S.C. § 602(a)(24) should be applied by this Court although it was not considered below. *See Bradley v. School Bd. of Richmond* (1974) ..... U.S. ....., 94 Sup. Ct. 2006, 2016-21.

EAS § 44-115.8 is also invalid under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it applies only when an AFDC family is

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20. The regulation uses the term "recipients of adult aids." When written, it referred to recipients of OAS, AB and APTD; the term was not changed when these programs were replaced by the federally administered SSI program. *See supra*, p. 5, n. 7.

sharing housing with one or more SSI recipients. If three AFDC children live with their mother and their elderly grandmother, and the latter receives $235 per month from SSI, then it is operative. If, however, the grandmother receives $235 (or $335, or whatever) from Social Security (Title II of the Act) or Railroad Retirement benefits, or Unemployment Insurance, earnings, etc., it does *not* apply; if the grandmother herself is an AFDC mother, it does not apply; if an AFDC family shares housing with another AFDC family, it does not apply. There is simply no conceivable rational basis for such capricious classification and it is therefore invalid. *McGowan v. Maryland* (1961) 366 U.S. 420; *United States Department of Agriculture v. Moreno* (1973) 413 U.S. 528, 538.

C. THE REGULATION AT ISSUE IN SWOAP V. WAITS CONCLUSIVELY PRESUMES THAT NON-NEEDY CARETAKER RELATIVES ARE WILLING AND ABLE TO, AND DO, PROVIDE FREE HOUSING AND UTILITIES TO THE AFDC CHILDREN RESIDING WITH THEM. IT THEREFORE VIOLATES HEW'S "ACTUALLY AVAILABLE INCOME" RULE AS WELL AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Critical to an understanding of this issue is the fact that non-needy caretaker relatives, as contrasted with parents, have absolutely no legal duty to support the children that accidental misfortune or parental neglect have thrust upon them. Therefore, under this Court's decisions in *King v. Smith* (1968) 392 U.S. 309 and *Lewis v. Martin* (1970) 397 U.S. 552, EAS § 44-115.6 is violative of the "actually available income" rule of the Social Security Act because it assumes a donative intent when such intent may not *in fact* be present. There must be "proof of actual contributions." 45 C.F.R. § 233.90(a); see also, 45 C.F.R. § 233.20(a)(3)(ii)(*c*) and cases cited by the Court below in *Swoap v. Waits,* Pet., App., 6-8.

Although we have no doubt as to the applicability of the foregoing federal regulatory provisions, even if the Court were to decide that they were inapplicable, EAS § 44-115.6, nevertheless violates the Fourteenth Amendment's Due Process Clause because it establishes a conclusive evidentiary presumption of donative intent with no rational connection between the fact proved (children living with relatives who have no duty to support) and the fact presumed (donation of housing and utilities). *Vlandis v. Kline* (1973) 412 U.S. 441, 452; *Heiner v. Donnan* (1932) 285 U.S. 312, 328-30; *Mobile, J. & K.C. Ry. v. Turnipseed* (1910) 219 U.S. 35, 43-44.

III. There Is No Compelling Reason Why This Court Should Preempt the U.S. Department of Health, Education and Welfare from Making an Initial Determination Whether or Not California Law, as Construed by the Court Below, Violates Supervening Federal Law.

At the outset, the Court should be fully aware of the rather bizarre posture of petitioners before the Court. They are officers of the Executive branch of California government who claim that a state statute, which they are bound to enforce as the Legislature intended, and as the Governor signed, California Constitution, Art. 5, § 7, is invalid because it breaches federal law. This attack on state law is made on their behalf by the State's Attorney General, who is also bound to defend the State Legislature's will embodied in its enacted measures. Calif. Const., Art. 5, § 21.

The claim that state welfare statutes or regulations violate federal law is ordinarily made by those adversely affected, the state's welfare recipients. The claim is that the state law *deprives* them of rights conferred by the supervening federal law. No such claim is asserted here. Rather,

state welfare officials thrust the Excalibur of federal law through the shield of a state statute in order to *deprive* recipients of the benefits which the California Legislature strove to confer upon them.

If the rulings below truly do put California's AFDC plan out of conformity with federal law, how are petitioners injured thereby? The only conceivable injury would be the threat of termination of federal funds. Title 42 U.S.C. § 604 provides that if the Secretary of HEW determines that a state plan no longer conforms to federal law, he shall cease providing federal funds to that state. See *Rosado v. Wyman* (1970) 397 U.S. 397, 430-33 (Black, J., dissenting); *Arizona Dept. of Public Welfare v. U.S. Dept. of HEW* (9th Cir. 1971) 449 F.2d 456, 460-62, *cert. den.* 405 U.S. 919 (1972); 45 C.F.R. § 213. The Secretary's decision is then reviewable by the Court of Appeals and finally by this Court. 42 U.S.C. § 1316(3), (5). No termination would occur until the review process is completed.[21] Since those contributions to California now approach $700 million annually, such a consequence is not to be looked upon lightly. However, there is absolutely no indication that HEW shares petitioners' interpretation of § 402(a)(7) or that the agency intends to initiate termination proceedings.

In *Rosado v. Wyman* (1970) 397 U.S. 397, 425-26, this Court rejected New York's suggestion that welfare recipients should not be permitted to initiate judicial proceedings challenging state laws as violative of federal welfare

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21. Actual termination cannot occur in California since the California Legislature has provided a statutory mechanism whereby any offending provision of California law is automatically amended to reach conformity when HEW issues a "formal ruling" of nonconformity. Welf. & Inst. Code § 11003; *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 454-55.

law until HEW has passed on the question. However, the serious adverse consequences that would befall recipients, who were correct in their claims, if they were subject to the long delays inherent in such a primary jurisdiction bar are inapplicable when the claim of nonconformity is raised by state officials administering the alleged nonconforming state law. Because of the different interests in such a situation, the arguments in support of primary jurisdiction made by Mr. Justice Black in his dissent in *Rosado, supra,* 397 U.S. at 430-35, are particularly appropriate under these peculiar circumstances.

CONCLUSION

For each of the foregoing reasons we would suggest that the Court deny the Petitions for Certiorari.

Dated: October 11, 1974
San Francisco, California

Respectfully submitted,

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Attorneys for Respondents

Exhibit 1

§ 11452. Minimum basic standards of adequate care

Minimum basic standards of adequate care shall be distributed to the counties and shall be binding upon them. Such standards are hereby determined on the basis of the schedule set forth in this section, as adjusted for cost-of-living increases or decreases pursuant to Section 11453, which schedule is designed to insure:

(1) Safe, healthful housing.

(2) Minimum clothing for health and decency.

(3) Low-cost adequate food budget meeting recommended dietary allowances of the National Research Council.

(4) Utilities.

(5) Other items including household operation, education and incidentals, recreation, personal needs, and insurance.

(6) Allowance for essential medical, dental, or other remedial care to the extent not otherwise provided at public expense.

(7) Other recurring special needs.

The schedule of minimum basic standards of adequate care is as follows:

Number of Needy Persons in the Same Family	Minimum Basic Standards of Adequate Care
1	$125
2	210
3	255
4	314
5	362
6	408
7	449
8	496
9	543
10	590

plus five dollars ($5) for each additional needy person.

The department shall establish rules and regulations assuring the uniform application statewide of the provisions of this section.

(Added by Stats.1965, c. 1784, p. 4014, § 5. Amended by Stats.197 1,c. 578, p. ....., § 28.5, eff. Aug. 13, 1971.)

Exhibit 2

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

Program Instruction
APA-PI-74-8
December 20, 1973

To: State Agencies Administering Approved Public Assistance Plans

SUBJECT: Need, Income and Resources of SSI Beneficiaries not to be Considered under Title IV-A

CONTENT: Section 414 of Public Law 92-603 amends the Social Security Act by adding Section 402(a)(24), effective January 1, 1973, and provides: "(24) if an individual is receiving benefits under Title XVI, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits under this title and his income and resources shall not be counted as income and resources of a family under this title."

This provision prohibits the inclusion of an individual receiving benefits under Title XVI, for the period for which such benefits are received, as a member of the AFDC assistance unit for purposes of determining need and the amount of the assistance payment under Title IV-A. It also prohibits the counting of income and resources of a beneficiary under Title XVI

as income and resources available to an assistance unit applying for or receiving assistance under Title IV-A.

A separate and independent computation for determining need and the amount of the assistance payment is required for AFDC assistance units when there are both Title IV-A applicants or recipients, and Title XVI beneficiary(ies) present in the same home. Computations for Title IV-A cases are not to include the needs, income or resources of Title XVI beneficiaries.

Under the provisions of 402(a)(24) State plans are to specify a method for the determination of need and the amount of the assistance payment which takes into consideration only the need, income and resources of the AFDC assistance unit and which does not include the need, income and resources of persons receiving benefits under Title XVI when they are in combined households.

In applying this provision contained in 45 CFR 233.20, the need, income, resources, and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home.

INQUIRIES

To: SRS Regional Commissioners.

Commissioner, Assistance Payments Administration